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RECORD, CASE No. 15,351.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~967~~. 549 251

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

BERTHA TOMLINSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 14, 1893.

RECORD, CASE No. 15,351.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 967.

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

BERTHA TOMLINSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 No. 354.

In the Supreme Court of the Territory of Arizona.

THE SOUTHERN PACIFIC COMPANY, Appellant,
vs.
BERTHA TOMLINSON, Appellee.

Transcript on Appeal.

Filed September 26, 1892.

T. D. HAMMOND, *Clerk.*

2 & 3 In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

Plaintiff for her complaint alleges that she is a resident of the county of Pinal, Territory of Arizona. That the defendant, The Southern Pacific Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and has an agent residing in the said county of Pinal.

That on the 24th day of June, 1891, and for a long time theretofore said defendant was engaged in running and propelling cars for the conveyance of freight and passengers over a railroad operated by it through said county of Pinal, and the said railroad ran through the town of Casa Grande, county and Territory aforesaid, and across many public passageways and highways of said town, and the said defendant ran, propelled and operated its said cars upon said railroad through said town of Casa Grande, and across the said passageways and highways.

4 That on said 24th day of June, 1891, in the night time thereof, at the said town of Casa Grande, while one Thomas Tomlinson was walking along one of the aforesaid public passageways which crossed the track of the defendant's said railroad, and as the said Tomlinson reached the crossing thereof, said defendant caused one of its locomotives and train of cars to pass through the said town of Casa Grande at a great, rapid and unusual rate of speed and to approach the aforesaid public passageway at a great, rapid and unusual rate of speed, negligently and carelessly omitting while passing through said town of Casa Grande and approaching said crossing to give any signal of warning by bell, whistle or otherwise, by reason whereof the said Thomas Tomlinson was unaware of the approach of said train of cars, and by reason of said negligence of said defendant and without any fault or negligence upon the part of said Tomlinson, the said cars ran against and knocked down the

said Tomlinson, wounding and lacerating his head and body and otherwise injuring him so that he, the said Tomlinson, in consequence and by reason of said injuries immediately thereafter died.

That the said Thomas Tomlinson left surviving him the plaintiff, who is his widow, and the following children, to wit: Alice Tomlinson, Fenton Tomlinson and Howard Tomlinson, Baby Tomlinson; and the said Thomas Tomlinson left Fenton Tomlinson, his father, and Mary Tomlinson, his mother, surviving parents. That this action is brought by the said plaintiff, Bertha Tomlinson, for the bene-
5 fit of herself and her said children, Alice, Fenton, and Howard and Baby, and Fenton Tomlinson, Sr., and Mary Tomlinson, his parents.

That by reason of the death of the said Thomas Tomlinson, caused and occasioned as aforesaid, damages have resulted to the said parents, surviving widow and children aforesaid of the said Thomas Tomlinson, to the sum of $50,000.00.

Wherefore plaintiff prays judgment in favor of herself and the other parties for whose benefit this suit is prosecuted, for the sum of $50,000.00 and for costs of suit.

BAKER & CAMPBELL,
Attorneys for Plaintiff.

(Endorsed:) Filed Oct. 21, 1891, at 9 a. m. Frank C. Kibbey, clerk.

In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

Demurrer.

The defendant demurring to plaintiff's complaint alleges
6 that said complaint does not state facts sufficient to constitute a cause of action, and asks that this action be dismissed at plaintiff's costs.

Answer.

The defendant, answering plaintiff's complaint herein, admits and denies:

First. Admits the residence of the plaintiff herein, and the organization of the defendant as a corporation, its appointment and residence of agent, and the occupation of said defendant as set forth in the first two paragraphs of plaintiff's complaint.

Second. Denies each and every other allegation of said complaint.

Wherefore defendant demands judgment and for costs.

W. R. STONE,
For Defendant.

(Endorsed:) Filed October 29, 1891. Frank C. Kibbey, clerk.

In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

Now comes the defendant and files this *his* amended answer to plaintiff's complaint herein, and admits, denies and alleges:

7 First. Admits the residence of the plaintiff herein, and the organization of the defendant as a corporation, its appointment and residence of agent, and the occupation of said defendant as set forth in the first two (2) paragraphs of plaintiff's complaint. Denies each and every other allegation of said complaint.

Second. And further answering, and for a plea in bar to plaintiff's right of recovery in this action, defendant alleges:

That, at the time alleged in plaintiff's complaint that the cars of defendant ran against and knocked down Thomas Tomlinson, the said Thomas Tomlinson willfully, wantonly and recklessly, exercising no ordinary or reasonable care, attempted to cross, or placed himself on the track of plaintiff's railroad at no regular crossing thereof, but on private right of way, and on no public highway, at such a distance from any crossing thereof, and at such a time, that this defendant nor its agents nor employees, could have avoided such accident, nor prevented said cars from running against nor knocking down said Thomas Tomlinson.

That said accident was not caused by any fault or negligence on the part of this defendant, its servants or employees, nor was the defendant at said time guilty of any negligence; but it was caused by and the result of willful negligence and want of ordinary care and caution on the part of said Thomas Tomlinson.

8 Wherefore defendant demands judgment, and for costs.

W. R. STONE,
H. N. ALEXANDER,
Def't's Att'ys.

(Endorsed:) Filed Dec. 4, 1891. F. C. Kibbey, clerk.

Be it remembered, that on the 16th day of May, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

It is ordered by the court that this cause be set for trial on Monday, the 6th day of June, 1892.

JOSEPH H. KIBBEY, *Judge.*

Be it remembered, that on the 6th day of June, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

The parties by counsel come, and this cause coming on reg-
9 ularly for trial, and the plaintiff having demanded a jury—nine jurors having been agreed upon by plaintiff and defendant as a sufficient jury to try this cause—the following-named persons were impanelled and sworn to try said cause, to wit: F. G. Hardwick, E. W. Carriger, Geo. W. Crandall, F. Morrell, J. H. Brown, J. B. Arnett, R. G. Lee, Benj. Bible, C. D. Henry.

After hearing a portion of the evidence, further hearing of the cause is continued until to-morrow.

Be it remembered, that on the 7th day of June, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

This cause came on regularly for trial, and, the jury being present, the hearing of evidence was resumed. After hearing the evidence, the arguments of counsel and the charges of the court, the jury retired to their room for deliberation thereon under the charge of a sworn officer of this court.

And thereafter the jury returned into open court their verdict, in the presence of the parties thereto, in the words and figures following, to wit:

10 In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

"We, the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff and assess damages against the defendant in the sum of $50,000, to be divided as follows:

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

C. D. HENRY, *Foreman.*"

And the jury returned with their verdict the following answers to questions propounded them, viz:

"1st. At the place where the occurrence took place could Thomas Tomlinson in his senses, by using his sense of hearing and sight, have known of the approach of the train that inflicted the alleged injury in time to have by the exercise of ordinary care avoided collision with the train?

11 "We the jury answer the above interrogatory, No.

"C. D. HENRY, *Foreman.*

"2nd. Was the head-light of the locomotive which struck Tomlinson lighted on the night and at the time of the collision?

"We the jury for answer to the second interrogatory say, Yes.

"C. D. HENRY, *Foreman.*

"3d. Did Thomas Tomlinson know that this train was coming the night of the accident?

"We the jury for answer to the third interrogatory say, No.

"C. D. HENRY, *Foreman.*

"4th. At Casa Grande station, the night of the accident, was there anything to obstruct the view of the train approaching from the east by one approaching the track from either side at or near the accident?

"We the jury in answer to the above interrogatory say, Yes, on the north side.

"C. D. HENRY, *Foreman.*"

Be it remembered that upon the same day came the attorneys for the defendant herein and filed with the clerk of said court the following, to wit:

Instruction asked by defendant at close of plaintiff's evidence, requested on the ground that the evidence shows conclusively that plaintiff's intestate (Tomlinson) was grossly negligent in attempting to cross the track with an approaching train in full view.

12 *Instruction.*

The evidence in this case shows that Thos. Tomlinson, plaintiff's intestate, who was killed by the train, did not use ordinary care in crossing the railroad track of defendant, and under the law is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant.

Dryden *vs.* Chicago, K. & N. R. R. Co., 28th Pac. Rept., 153.

(Endorsed:) Tendered by def't at close of plff's case and refused. J. H. Kibbey, judge. Filed June 7th, 1892. Burton J. Hawley, clerk.

Be it remembered, that on the 8th day of June, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

The parties hereto appeared in court by their attorneys and the defendant files its motion to set aside the verdict herein and grant a new trial of this cause. Counsel for plaintiff waiving notice, said motion was submitted without argument and by the court taken under advisement.

13 In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, ETC., Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

Now comes the defendant and moves the honorable court to set aside the verdict rendered herein June 7th, 1892, and to grant a new trial of this cause on the following grounds, viz:

First. Errors of law committed by the court during the progress of the trial, which will be fully set forth in statement of facts and bill of exceptions to be filed and settled.

Second. That the evidence is insufficient to support the verdict.

Third. That the verdict is against the law.

Fourth. That the verdict is against the law and the evidence.

Fifth. That the damages assessed by the jury in their verdict is excessive, unsupported by the evidence, and were given under the influence of passion and prejudice.

This motion is based upon the minutes of the court,
14 record of the case and statement of facts and bill of exceptions to be hereafter filed.

H. N. ALEXANDER,
W. R. STONE,
Att'ys for Def'ts.

(Endorsed:) Filed June 8th, 1892. Burton J. Hawley, clerk.

Be it remembered that on the 11th day of June, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

And now comes Baker & Campbell and G. C. Israel, attorneys of record for the plaintiffs and beneficiaries herein, and in open court

voluntarily makes and files the following remitter of the amounts of the verdict returned herein, and remits as follows:

In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Defendant.

15 Comes now Bertha Tomlinson on behalf of herself and others interested herein and remits from the verdict heretofore rendered herein in the sum of $50,000, the following sums:

Bertha Tomlinson	$8,000,	remitted	to	$6,000
Alice Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson	8,000,	"	"	3,000
Howard Tomlinson	8,000,	"	"	3,000
Baby Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson, father	5,000,	"	"	1
Mary Tomlinson, mother	5,000,	"	"	1

thereby making a total remittance of $31,998 and allowing the verdict to stand at $18,002.

BAKER & CAMPBELL, AND
G. C. ISRAEL,
Attorneys for Plaintiff and Beneficiaries.

Whereupon said remittance and remitter is by the court allowed; and the cause coming on further to be heard upon the defendant's motion for a new trial herein, and the court having heard the argumentof counsel and being fully advised in the premises, the said motion for a new trial is overruled and denied, to which ruling of the court the defendant then and there excepted, and exception was allowed by the court.

Whereupon the court orders that plaintiff have judgement against the defendant for the sum of $18,002, apportioned as follows, to wit:

Bertha Tomlinson	$6,000
Alice Tomlinson	3,000
Fenton Tomlinson	3,000
16 Howard Tomlinson	3,000
Baby Tomlinson	3,000
Fenton Tomlinson, father	1
Mary Tomlinson, mother	1

From which judgment and order overruling the motion for a new trial the defendant in open court gave notice of appeal to the supreme court of the Territory.

JOSEPH H. KIBBEY, *Judge.*

And be it further remembered that thereafter, upon the same day, the following proceedings were had, to wit:

BERTHA TOMLINSON
vs.
THE SOUTHERN PACIFIC CO.

Bill of Exceptions.

Now comes the defendant and files its bill of exceptions to the judgment and order of the court overruling a motion for a new trial herein, in the words and figures following, to wit: (here insert:) and the same having been examined by the court and found correct, it is ordered by the court that the same be filed and made a part of the record of this case, and that the defendant herein be allowed statutory time after adjournment of term for filing statement of facts.

JOSEPH H. KIBBEY, *Judge.*

17 In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., a Corporation, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that on the trial of this action and on the 7th day of June, 1892, and after the plaintiff had introduced all her testimony and rested the case, the following instruction was presented to the court and asked to be given, to wit:

"Instruction asked by defendant at close of plaintiff's evidence, requested on the ground that the evidence shows conclusively that plaintiff's intestate (Tomlinson) was grossly negligent in attempting to cross the track with an approaching train in full view.

Instruction.

"The evidence in this case shows that Thomas Tomlinson (plaintiff's intestate), who was killed by the train, did not use ordinary care in crossing the railroad track of the defendant, and under the law plaintiff is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant."

18 Endorsement by the presiding judge: "Tendered by defendant at close of plaintiff's case and refused. J. H. Kibbey, judge."

To which ruling the defendant then and there duly excepted, and time was given during the continuance of this term of the court to prepare and file bill of exceptions thereto.

And be it further remembered that on the said 7th day of June, 1892, the jury duly empanelled in the above-entitled action rendered the following verdict:

"We, the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff and assess damages against defendant in the sum of $50,000, to be divided as follows:

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

C. D. HENRY, *Foreman.*"

And be it further remembered that on the 8th day of June, 1892, defendant moved the court to set aside the verdict and grant defendant a new trial for the reasons therein set forth.

That on the 10th day of June, 1892, plaintiff, in open court, made and filed and offered a remittitur, which is in words and figures as follows, to wit:

19 Comes Bertha Tomlinson on behalf of herself and the others interested herein and remits from the verdict heretofore rendered herein in the sum of $50,000, the following sums:

Bertha Tomlinson	$8,000,	remitted	to	$6,000
Alice Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson	8,000,	"	"	3,000
Howard Tomlinson	8,000,	"	"	3,000
Baby Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson, father	5,000,	"	"	1
Mary Tomlinson, mother	5,000,	"	"	1

thereby making a total remittance of $31,998 and allowing the verdict to stand in the sum of $18,002.

BAKER & CAMPBELL, AND
G. C. ISRAEL,
Attorneys for Plaintiff and Beneficiaries.

Defendant objected to the remittance being allowed; whereupon the court sustained the remittance, overruled the motion for new trial and ordered judgment for the sum of $18,002, to which the defendant *there* and there duly excepted, and time was given during the continuance of this term of the court to prepare and file bill of exceptions thereto, and defendant now makes and files this bill of exceptions during and at this term of the court.

W. R. STONE,
H. N. ALEXANDER,
Att'ys for Def'ts.

Endorsement by the presiding judge:

"The above bill of exceptions having been submitted to
20 the counsel for the plaintiff this day, and having been by such counsel assented to as correct, and I having examined the same and found it to be correct, I do now sign the same and direct the same to be filed and made a part of the record of the case in this court.

Done at Florence, A. T., June 11, 1892.

JOSEPH H. KIBBEY,
Judge of said Court.

(Endorsed:) Filed June 11, 1892. Burton J. Hawley, clerk.

Be it remembered, that on the 11th day of June, 1892, the same being a judicial day of the April term of said court, the following proceedings, among others, were had, to wit:

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., a Corporation, Defendant.

Judgment.

This cause came on regularly for trial on the sixth day of June, 1892; the plaintiff and beneficiaries appeared by their attorneys Baker & Campbell and G. C. Israel, Esq., and the plaintiff Bertha Tomlinson as well in person, and the defendant appeared by H. N. Alexander, Esq., and W. R. Stone, Esq., its attorneys, and all the parties announcing in open court their readiness for trial, a jury of nine persons were regularly impanelled and sworn to try said cause.

Counsel of the respective parties having in open court con-
21 sented to try said cause with a jury of nine persons, witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the argument of counsel and the instructions of the court, the jury retired to consider of their verdict and subsequently returned into court with the verdict signed by the foreman in the words and figures following, to wit:

"We, the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff and assess damages against the defendant in the sum of $50,000, to be divided as follows:

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

(Signed) C. D. HENRY, *Foreman.*"

Which verdict was by the court received and filed. Whereupon the defendant filed its motion for a new trial, and pending the hearing of said motion in open court on the eleventh day of June, 1892, the plaintiff Bertha Tomlinson and the beneficiaries named in said complaint came by their said attorneys Baker & Campbell and G. C. Israel, and upon said day, as yet of the regular term of the court, moved the court, in open court, that plaintiff be allowed to make remittance of and from the verdict herein as follows, to wit:

From the verdict heretofore rendered herein in the sum of $50,000 the following sums:

22	Bertha Tomlinson	$8,000,	remitted to	$6,000
	Alice Tomlinson	8,000,	" "	3,000
	Fenton Tomlinson	8,000,	" "	3,000
	Howard Tomlinson	8,000,	" "	3,000
	Baby Tomlinson	8,000,	" "	3,000
	Fenton Tomlinson, father	5,000,	" "	1
	Mary Tomlinson, mother	5,000,	" "	1

thereby making a total remittance of $31,998 and allowing the verdict to stand at the sum of $18,002, and said plaintiff's attorneys having asked and been allowed by the court to spread said motion upon the minutes of the court and have the same noted upon the docket, and as well file said motion in writing, and all of said things having been done, the court proceeded to hear and determine the motion for a new trial and denied and overruled the same and ordered that plaintiff be allowed judgment in accordance with her voluntary remittance in the sum of $18,002, as by the said remittance apportioned.

Wherefore, by reason of the law and premises aforesaid, it is ordered, adjudged and decreed that the said plaintiff do have and recover from The Southern Pacific Company, the defendant herein, the sum of $18,002, with interest thereon from the date hereof at the rate of seven per cent. per annum until paid, for the benefit of the persons hereinafter named, in the sums following, to wit:

Bertha Tomlinson, plaintiff	$6,000
Alice Tomlinson, child	3,000
Fenton Tomlinson, child	3,000
Howard Tomlinson, child	3,000
Baby Tomlinson, child	3,000
Fenton Tomlinson, father	1
Mary Tomlinson, mother	1

23 And it is further adjudged that the plaintiff do have and recover of and from the defendant her costs and disbursements incurred in this action, amounting to the sum of $978.55.

JOSEPH H. KIBBEY, *Judge.*

Thereafter, on the 17th day of June, 1892, the defendant filed its "motion to retax costs," in the words and figures following, to wit:

In the District Court of the Second Judicial District of Arizona in and for Pinal County.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., a Corporation, Defendant.

The defendant moves the court hereby to retax plaintiff's costs herein, as evidenced by memorandum of costs filed June 11th, 1892, and on the following grounds, viz:

That said memorandum of costs is not itemized, nor does it contain or set forth the dates and times when the same were incurred.

That the costs marked as witness fees on first page of said
24 memorandum of costs were not incurred at the trial of this action commencing June 6, 1892, and plaintiff is not entitled to recover the same nor any part thereof.

That the items on said first page of said memorandum of costs designated "serving subpœnas," $77.20, and "clerk's fees," $28.55, do not state for what services nor when rendered, and do not give defendant sufficient information to enable defendant to state what part of said sums, if any, are proper charges as costs herein, nor to disprove of any part thereof.

That the items on page 2 of said memorandum of costs, as far as the words "June, '91," were not incurred at the trial of this action commencing June 6th, 1892, nor is defendant liable therefor nor any part thereof, nor are said items set forth with dates and facts to enable a person of ordinary understanding to know when and for what said services were rendered, if at all, nor that any of said alleged costs have been paid by plaintiff.

That the witnesses Atkinson and Kremer were brought into court as jurors and not entitled to receive mileage herein as witnesses, as set forth in said memorandum of costs.

That none of the witnesses as set forth in said memorandum of costs actually traveled the number of miles set forth therein.

That plaintiff has not paid the costs set forth in said memorandum nor is she liable for the same, and the same are excessive.

That defendant bases this motion on said "memorandum of
25 costs," the venire of jurors to try this action on June 6th, 1892, and on the minutes of the court relative to this action; also on the papers that constitute the record of this court in said action.

W. R. STONE,
H. N. ALEXANDER,
For Def't.

(Endorsed:) Filed June 17, 1892. Burton J. Hawley, clerk.

And thereafter, on the 21st day of June, 1892, the defendant filed its bond on appeal in words and figures as follows:

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Pinal.

BERTHA TOMLINSON, Plaintiff and Appellee,)
vs.)
THE SOUTHERN PACIFIC CO., Defendant and Appellant.)

Bond on Appeal to Supreme Court.

KNOW all men by these presents that the Southern Pacific Company, as principal, and Leo Goldman, W. T. Smith, B. Heyman, and John Y. T. Smith, as sureties, are held and firmly bound
26 unto Bertha Tomlinson, appellee in the above-entitled action, in the sum of forty thousand ($40,000) dollars, lawful money of the United States, to be paid to said appellee, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed, sealed, and dated the 18th day of June, A. D. 1892.

Now, whereas in the above-entitled action, on the 11th day of June, 1892, by the above-entitled court, a judgment was rendered against The Southern Pacific Company, appellant, for $18,002 and costs of suit, and the probable costs of suit of this court and the appellate court, as fixed by the clerk of this court, are ($1,100) eleven hundred dollars, and appellant desires to suspend the execution of this judgment:

Now, therefore, the condition of this bond is such that the said The Southern Pacific Company, appellant as aforesaid, shall prosecute its appeal with effect, and in case the judgment of the appellate court shall be against appellant, appellant shall perform its judgment or decree and pay all such damages and costs as may be awarded against appellant upon the appeal.

THE SOUTHERN PACIFIC COMPANY,
By G. L. LANSING, [SEAL.]
Secretary and Controller.

[SEAL.] LEO GOLDMAN. [SEAL.]
W. T. SMITH. [SEAL.]
B. HEYMAN. [SEAL.]
JOHN Y. T. SMITH. [SEAL.]

27 TERRITORY OF ARIZONA,)
County of Maricopa,) *ss:*

Leo Goldman, W. T. Smith, B. Heyman, and John Y. T. Smith, whose names are subscribed as sureties to the foregoing bond, being severally duly sworn, each for himself says that he is a resident and householder within Maricopa county and Territory of Arizona, and is worth the following amount over and above all his debts and liabilities in unincumbered property situated within this Territory, exclusive of property exempt from execution and forced sale, viz:

The said Leo Goldman says he is worth as aforesaid the sum of ten thousand dollars; the said W. T. Smith says he is worth as aforesaid the sum of ten thousand dollars; the said B. Heyman says he worth as aforesaid the sum of ten thousand dollars, and the said John Y. T. Smith say- he is worth as aforesaid the sum of ten thousand dollars.

LEO GOLDMAN.
W. T. SMITH.
B. HEYMAN.
JOHN Y. T. SMITH.

Subscribed and sworn to before me June 18th, 1892.
J. L. B. ALEXANDER,
Notary Public.
[SEAL.]

(Endorsed:) Approved June 21, 1892. Burton J. Hawley, clerk. Filed June 21, 1892. Burton J. Hawley, clerk.

And thereafter the defendant filed its statement of facts, in the words and figures following:

28 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Pinal.

BERTHA TOMLINSON, Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., a Corporation, Defendant.

Statement of Facts.

Be it remembered that on the trial of this cause the testimony as contained in the following pages was offered and admitted in evidence on the part of the plaintiff and defendant and same is offered as statement of the facts to be used on the appeal of said cause, and that it also is a full statement of proceedings had in said action up to rendering judgment.

Mr. ARTHUR H. ELLIOT, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

By Mr. ISRAEL:

Q. Where do you reside?
A. Casa Grande.
Q. Where were you residing on the 24th day of June last?
A. I resided at Casa Grande, sir.
Q. Did you know Thomas Tomlinson in his lifetime?
29 A. I did, sir.
Q. Did you see him in the afternoon or evening of that day?
A. I saw him in the forenoon of that day.

Q. Do you remember the circumstances of an accident happening at Casa Grande that night?

A. Yes, sir.

Q. Where were you at that time?

A. Sitting in front of my residence at Casa Grande, with my family and a lady by the name of Mrs. Atkinson, now living in California.

Q. Where is your residence as relates to the depot at Casa Grande?

A. A little south—between the residence of Mr. Tomlinson and that of Mr. Marshall.

Q. What time was this?

A. Close onto dark; nearer towards dark than daylight.

Q. Do you remember the circumstances of a train coming in about that time?

A. Yes, sir.

Q. From what direction?

A. From Tucson direction, from the east.

Q. When did you first see that train?

A. I saw the train as it came near towards the tank; my house sets back in the lot, and Mr. Marshall's house protrudes out further than mine does——

The COURT: Mr. Elliot, you are cautioned only to answer the questions.

Q. Look at this diagram (exhibiting diagram to witness); turn it around so the jury can see it; suppose this square marked depot to be the point at Casa Grande where the passenger depot is situated, and these blue lines running across the paper to be the main track and side tracks of the Southern Pacific Company—the railroad tracks; this being to the east; the plots marked J. C. Love, Thomas Tomlinson and W. C. Smith to be residences; now where is your house situated?

A. Situated right south of the plat marked Tomlinson; my house would be right in the centre, south of the track.

Q. Where is the tank?

A. Right out this way.

Q. Point marked 22 south?

A. Yes, sir.

Q. What is the distance?

A. I ran a water pipe once from my house there and it measured 1,200 feet; I judge about 1,100 feet.

Q. Did anything attract your attention that night to the train?

A. Nothing any more than it was running very fast when it struck the tank.

Q. About how fast?

A. I put it 20 miles an hour.

Q. How far is that tank-house from the depot?

A. I should suppose 1,400 or 1,500 feet.

Q. What signals were made when you first saw it?

A. I heard none.

Q. Any bell rung?
A. No, sir.
Q. Whistle blow?
A. I heard no whistle.
31 Q. Prior to the time it struck the tank what signals had been sounded?
A. I recognized none, because I was not looking for any.
Q. Did you see it from the tank-house to the depot?
A. Yes, sir.
Q. What signals, if any, were given after it left the tank-house, during the time it was traversing the distance from the tank-house to the depot?
A. None whatever; I heard no bell or whistle.
Q. How fast were they running?
A. I say 20 miles an hour.
Q. Did the train stop before it came to the depot?
A. The rear part stopped.
Q. Describe how.
A. The cars came together with a jar and the wheels stopped very suddenly; I could see the dust fly up very suddenly just like so much powder; sparks and dust flew from the wheels; could see it very distinctly.
Q. Where was the engine at that time?
A. It had passed north of the depot at that time, running northwest—running San Francisco-way; it came from Tucson-way and was running San Francisco-way; it was past the depot; this rear part of the train would be up near the lumber yard.
Q. Where was the engine when they began checking?
A. Up near the lumber yard.
32 Q. Have you had any experience in checking trains?
A. Yes, sir, I have cinched trains; I have been a telegraph operator there at Casa Crande, and have run on freight trains between Yuma and San Simon.
Q. What kind of a train was this?
A. A special cattle train going west, as I understood it.
Q. State how it was checked when it first began checking—slowly or suddenly or how?
A. There was a great many trains running through the yard——

The COURT: That is not the question.

Q. I would like to have you describe the manner in which it was checked.
A. The first my attention was drawn to it the train was running very rapid—20 miles an hour as I thought; it came to a stop very suddenly; I was not noticing the engine when it made the first attempts to stop; the cars coming together very suddenly and the dust flying up is what attracted my attention.
Q. What signals as to blowing of whistles or ringing of bells, did you hear up to the time of this sudden checking?
A. I heard no bell at all.

Q. After the train had been checked did you go over to the railroad track?

A. Yes, sir.

Q. Did you find anything?

A. I found Thomas Tomlinson lying on a cot.

Q. At what point?

33 A. Near the lumber yard. I live on the south side of the track; Mr. Tomlinson was on a cot on the outside of the track—on the north side of the track.

Q. What was his condition?

A. Insensible.

Q. Did you make any examination of his person?

A. I did; I helped pack him on the cot to his house.

Q. What did you see?

A. A fracture on his head, a wound on his knee—a large indenture; his shoe was cut, I took it off and the whole heel was cut off.

Q. Could you describe the wounds definitely?

A. There were a great many examined him the same as myself; I considered there was no hopes for him.

Q. Describe the size of the hole you speak of.

A. About as large as my thumb.

By the COURT:

Q. Any bleeding?

A. Yes, sir; the doctor was right there and attended to him. He was injured in his head and here in his knee—a deep gash here; the heel was entirely cut off so you could see the sinews all exposed.

Mr. ISRAEL, resuming:

Q. Were you with him after that?

A. Yes, sir; nearly all the time until after he died—from 8 to 12—four hours, somewhere along there—four hours, I should think, sir.

Q. About how far east of the depot was it you saw Thomas Tomlinson in this injured condition?

34 A. He was lying between the lumber pile and the depot platform, which would be probably 100 or 125 feet from the east edge of the platform.

Q. From the edge of the platform or edge of the building?

A. Edge of the platform.

Q. Now will you describe generally the situation of Casa Grande—where the business houses are, etc.?

The COURT: Hav'n't you that on the plat?

(Question withdrawn.)

Q. Taking that point upon the railroad where you saw Thomas Tomlinson, whereabouts is it as to the general crossing place of the railroad track from the north to south of Casa Grande?

A. The place where Mr. Tomlinson has crossed, I have seen him cross——

The COURT: Oh, no, that is not the question.

Q. The direct crossing?

A. The only general crossing I have seen is right east of this platform; it is very seldom I have seen pedestrians pass right at the crossing.

Q. Compared with the point where Mr. Tomlinson crossed?

A. Pedestrians cross there promiscuously; I have crossed hundreds of times there myself.

Q. How is it as to there being a public crossing there?

Objected to and question not pressed.

Q. Now, taking this point where you saw Mr. Tomlinson on the railroad track, for a distance of 50 feet east and west of that point——

35 Mr. STONE: Object because he didn't say that he saw Tomlinson on the railroad track.

The COURT: No, no evidence that there is where he was struck.

Mr. ISRAEL: We will ask permission to recall the witness. Take the witness.

Cross-examination.

By Mr. STONE:

Q. Locate your house on this plat (designated as Defendant's Exhibit "A").

A. This would be Mr. Tomlinson's house here; here is the residence here; here is my lot here.

By the COURT:

Q. Where?

A. Right south; my lot would lie southeasterly of Tomlinson's lot, immediately adjoining it.

Mr. STONE, resuming:

Q. Where is your house?

A. My house sits here in the back part of the lot, some little distance in the rear of Mr. Tomlinson's house and some little distance back of Judge Marshall's house.

Q. How far back from the front line of that lot?

A. I would put it 100 feet.

Q. Where is the depot located on that plat?

A. At the place marked "depot,"—northerly and westerly of my place.

Q. Is your lot the same size as Tomlinson's lot?

A. It is the same depth this way, but wider.

36 Q. About the same distance from front to rear as Marshall's?

A. Yes, sir, it sets a little back of Marshall's, and a little back of Tomlinson's.

Q. Make a mark about where you consider your house is?

A. (Marks a square on the lot with a pencil.) That would be it, about here.

Q. Where were you sitting?

A. Directly in front of my house; it looks directly toward the railroad track; I can see every train as it runs by if sitting in front of my building.

By the COURT:

Q. These outlines of the lots are parallel to the railroad track as indicated on the plat?

A. Yes, sir.

Mr. STONE, resuming:

Q. About how far is your house from the depot in a direct line?

A. My house from the depot? My house from where it is set, I suppose, would be about 400 feet; the lot is 300 feet, and the railroad track about 200 feet, probably.

Q. How long have you lived there?

A. Since 1881.

Q. What called your attention to the train that night?

A. The way it was running and the quick stop it made.

Q. Did you notice the train before it made this quick stop?

37 A. I saw it after it left the tank; I heard a light roaring noise, like most trains running in; I was talking with my family and this lady from California.

Q. You saw it near the tank?

A. Yes, sir.

Q. Did anything particular call your attention to it?

A. Nothing more than it was running rapidly.

Q. Don't through trains run rapidly?

A. Sometimes they do.

Q. Now, did anything in particular call your attention to this train?

A. Nothing more than it was running pretty rapid, and the quick stop.

Q. Your attention was called by the quick stop?

A. It dashed by the same as if it ran past that door.

Q. Were you giving it your attention before you noticed it running rapidly?

A. I noticed it at the tank.

Q. You simply noticed there was a train approaching when it passed the tank; did your attention recur to it, or did you notice it all the time after it passed the tank?

A. I noticed it, I tell you, at the tank. I could tell you what caused me to get up and go to the train, if you wish.

Q. You answer my questions; when I get through perhaps I will ask for suggestions. Where was the engine when it began to check up speed?

38 A. The engine, as I remember it, was close to the depot; in fact, the train stopping suddenly——

The COURT: He asked you where it was when it began to check.

A. It was close in the neighborhood of the depot; I couldn't say.

By Mr. STONE, resuming:

Q. In answer to a question on direct examination you said it was at the depot when it began to check; you take that back now, do you?

A. I don't take anything back.

Mr. CAMPBELL: Object.

Q. How do you know it was at the depot?

A. The train was composed of about 20 cars; coming to a sudden stop, the rear part was considerably down the track; it was the rear part that placed the engine for me.

Q. Do you know where the train was?

A. I went over to the train afterwards and know where it lay.

Q. Do you know where the engine was when it began to check?

A. To the best of my ability——

Q. Did you see the engine when it began to check?

A. No, sir.

Q. Do you know where it was?

A. Afterwards, I went over and saw it.

Q. Where was it?

A. Over about the extreme west end of the railroad switch, where some coal had been.

39 Q. How far was the engine west of the east end of the depot platform when you saw it?

A. I couldn't give it in feet exactly; the east end was up by the lumber yard.

Q. From where you were sitting that night in front of your house can you see the railroad depot?

A. Oh, yes, sir.

Q. Which side of the house of Mr. Tomlinson do you look?

A. Towards Mr. Tomlinson's.

Q. To the right or left?

A. Left; I would be looking towards my left to get a full view of the train.

Q. Was the head-light burning on the locomotive that evening?

A. I thought it was.

Q. Did you notice whether the whistle blew that night on that train?

A. No, sir; I am positive it did not blow in the yard; the yard I call beyond the tank; the switch extends below the tank.

Q. Do you notice every train that comes in there, whether the whistle blows or bell rings or not?

Mr. ISRAEL: Object.

The COURT: You can go ahead and test his opportunity.

A. I have every opportunity for noticing.

Q. Well, do you notice?

A. Couldn't help hearing the bell, the train runs so close to my building.

Q. Do you notice every sound you hear?

40 A. That is rather a broad question; I couldn't say.

Q. Do you notice every engine that runs into the yard, whether the bell rings or whistle blows?

A. That I couldn't say; I have some other duties to perform besides watching railroad trains.

Q. Do you know how Mr. Tomlinson came to his death?

A. Well, I presume——

Q. Not what you presume. Do you know?

The COURT: I will sustain an objection to that.

A. Shall I answer that question, sir?

The COURT: No, sir; it would require an expert to answer that question, I suppose; otherwise the jury would know just as much as Mr. Elliott about it.

Q. From where you were sitting in front of your house that evening, how far east can you see an approaching train?

A. Some little distance beyond the tank towards Tucson; the train was coming from Tucson that evening.

Q. Was there any obstruction to the view from your place to any point on the railroad track, looking eastward?

A. If I wanted to go to the gate I could see probably 20 miles east; being at my house, I could only see a little beyond the tank, on account of Judge Marshall's house being in line.

41 Q. From your gate to the gate of Thomas Tomlinson, or gate of Thomas Tomlinson's lot, the next lot west of yours, was there any difference in the view of the railroad track, looking eastward along the line?

A. No, sir.

Mr. CAMPBELL: Object.

The COURT: Objection sustained.

Q. Will you look at that plat and indicate on that plat by the objects if you can—the identified objects—the point where the engine stopped that night when you went up to see it?

A. Where the engine stopped; this would be my residence here; I passed here by the lumber pile; this is the lumber pile, gentlemen of the jury, here; I think the train would end here; I saw Mr. Tomlinson here, lying on a cot.

The COURT: That is not the question.

A. The engine would probably be here, at the extreme end of the depot platform.

Q. Not probably; tell just exactly where it stood, how many feet west of the depot.

A. Towards San Francisco, or towards Yuma, she was running; it would be about here.

Q. How many feet?

A. I never measured it.

Q. About how many?

A. About 20 car-lengths.

Q. From where?

A. Taking in about that much of the lumber pile here; I had to go around the car to get around to the lumber.

42 Q. How many feet from the east end of the plaform as marked on that plat was the engine?

A. The engine would rest about here and the rear would be down here.

Q. Well, about 100 feet from the east end of the depot?

A. From the east end of the depot?

Q. Yes.

A. More than that, I should think; it would stand about in that proportion; the rear end of the train didn't clear the lumber yard.

Q. Do you know it was 20 car-lengths?

A. I presume it was from the best information I could get.

Q. How many feet would that be?

Mr. ISRAEL: I suppose the witness is testifying as well as he knows.

The COURT: How long was the train, I suppose he means.

A. I can state I never paid much particular attention to the train; I was taken up with taking care of Mr. Tomlinson.

By the COURT:

Q. If you don't know, say you don't know.

A. Well, I will say I don't know.

Mr. STONE, resuming:

Q. How many car-lengths in the train?

A. About 20.

Q. How long?

A. Some are longer than others—combination cars, cattle cars.

43 Q. How long is an ordinary combination cattle car?

A. There will be experts here to testify.

By the COURT:

Q. State whether you know or not.

A. I do not know, sir.

GEORGE DUNBAR, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Where do you reside?
A. Casa Grande.
Q. Where were you on the 24th day of June, 1891?
A. About four o'clock I was standing in front of Mr. Tomlinson's store talking with him.
Q. Did you see Mr. Tomlinson about dark that night?
A. Just about dusk I saw him close up his store and go over to Creamer's.

Mr. ALEXANDER: I don't like to object to leading questions.

Q. What time of night was that?
A. That I saw him last?
Q. Yes.
A. Just about dusk.
Q. State whether or not there was a train coming into Casa Grande about that time.
44 A. I recall the circumstance of a train coming in pretty rapid.
Q. How long after you saw Mr. Tomlinson?
A. Twenty minutes or half an hour.
Q. Where were you when it came in?
A. Sitting in front of a saloon kept by Mr. McQueen.
Q. Which side of the track?
A. North side of the track.
Q. Look at that diagram a minute, and at this point marked "Tomlinson's store." Where is McQueen's saloon from that?
A. The next door west.
Q. Where was the train when you first saw it?
A. I saw the head-light probably 20 minutes before it came down close.
Q. What were you doing from the time you saw the head-light until it came down close?
A. Talking with an old gentleman that lives at Casa Grande.
Q. Did the train stop there that night?
A. Yes, sir; that was the conversation between him and me—in regard to some ice——

The COURT: No.

Q. Were you noticing it from the time you saw the head-light until it stopped?
A. Yes, sir; sat right there.
Q. Where did it stop?
A. It stopped—the rear end of the train must have stopped about 80 feet east of the depot, somewhere near that.

45 Q. Where was the engine from the depot when it began checking?

A. It checked before it got to that point; about 70 or 80 feet on the road east was the first point.

Q. Prior to the time it checked, what signals, if any, were given?

A. I didn't hear any at all.

Q. Did you hear any bell rung or whistles blown?

A. No, sir; I didn't hear any.

Q. About what speed was the train running?

Mr. ALEXANDER: Object, unless it is shown he is an expert.

The COURT: Let him give his opinion.

Q. In your opinion, what was the speed of the train as it came in?

A. I supposed about 20 miles an hour.

Q. What was the manner of its checking?

A. Very sudden.

Q. Did you go over to the point where it commenced checking?

A. Yes, sir; when I saw the railroad man jump off with his lantern.

Q. What did you find?

A. Found Mr. Tomlinson.

Q. Where was he lying?

A. On the north side of the main track.

Q. Can you indicate on this plat about where he was lying? Supposing this to be the lumber yard—the top of this plat being north—the point marked "Tomlinson's store" the place where his store was situated; and supposing these double blue lines

46 to represent the main track, and the upper and lower ones to represent the switches, and this point marked "depot" to represent the passenger depot at Casa Grande, the perpendicular lines the point where the wagon crossing is—where was Mr. Tomlinson lying?

A. Seventy or eighty feet from the east end of the depot.

Q. How far from the lumber pile?

A. Right close to it.

Q. How close to the main track?

A. Lying between the two tracks—the main track and the side track.

Q. Which way was his head?

A. Toward the east when I saw it.

Q. What was his condition?

A. Well, he appeared to be senseless.

Q. What, if any, wounds did you see on him?

A. I saw this mark on his head.

Q. What was this mark on his head?

A. It seemed to be a hole cut in his head.

Q. Any other wounds cut in his person?

A. I saw one of his feet was pretty badly smashed.

Q. Who else did you see there at that time?

A. I don't know; there was as many as could stand around.

Q. How long was it from the time you saw the train checked until you saw Mr. Tomlinson lying there?

47 A. It could not have been more than half a minute; this conductor ran out; I heard somebody say somebody was hurt.

Q. Did you see the conductor?

A. I don't know whether he was conductor or brakeman. I saw somebody get off the train, off the caboose; it was about a car and a half east of me where he lay.

Q. What kind of a train was it?

A. I don't know whether it was a cattle train or not; it was what we call a freight train.

Q. At that point you have indicated on that map where you saw Mr. Tomlinson lying, what is the surface of the tracks, taking it from each side?

A. It is all level and smooth.

Q. What obstructions from the points marked "saloon," "restaurant," "barber shop" and "Tomlinson's store" to the points marked (residences) "Loss," "Smith," "Marshall," and "Tomlinson" on the south?

A. Nothing, except a train of cars is standing on the track.

Q. As to the surface?

A. It is all smooth.

Q. What is the character of the buildings on the north side?

A. Stores—business houses.

Q. What is on the south side?

A. Residences.

Q. What is the custom of persons crossing from one side to the other?

48 A. Cross wherever they feel like it; when a man came up to the road he went across; Mr. Tomlinson had a trail right across there.

Q. How long has that been a custom?

A. Ever since I have been in Casa Grande.

Q. How long?

A. About six years.

Q. Have you been in Casa Grande when the passenger trains stopped to discharge passengers?

A. Yes, sir.

Q. Have you been there when any passenger train stopped to discharge its passengers coming from the east?

Mr. ALEXANDER: Object; this is a freight train; it would be immaterial.

The COURT: You may ask that question.

Mr. ALEXANDER: Except.

A. I have, from both ways.

Q. Now, I will ask you where the coaches of the passenger train coming from the east and going to the west stop at Casa Grande in relation to this point where you saw Mr. Tomlinson lying?

Mr. ALEXANDER: I make the objection that it is immaterial and irrelevant and cuts no figure in any issue raised in this case.

The COURT: Objection overruled.

Mr. ALEXANDER: Except.

Q. You may answer the question.

By the COURT:

Q. Where were the Southern Pacific trains in the custom of discharging passengers—trains going towards San Francisco?

49 A. They were in the custom of discharging them 60 feet or more above the depot; I don't know that I ever saw them get off right where Mr. Tomlinson was lying.

Mr. ISRAEL, resuming:

Q. Taking the southwest corner of what is indicated on this map as the lumber pile, where, in connection with that point, were the passengers in the habit of getting off?

A. I couldn't say I had seen them at that point, but I have all along there, for 60 feet above there.

Q. On the 24th day of June, 1891, what obstructions were on the north side of this railroad track east of the depot?

A. There was nothing until you come to the lumber yard.

Q. Describe it as it existed on the 24th day of June, 1891.

A. It is a matter a man would hardly get at accurately, because some piles were high and some were low.

Q. How were they in reference to this side track?

A. Right close by.

Q. Was the lumber pile parallel or at right angles to the railroad track?

A. Right angles.

Q. How long were the piles?

A. Twenty-four to twenty-six feet stuff.

Q. How high?

A. Eight to ten feet high.

50 Q. What obstructions were there after you passed above the lumber yard?

A. The buildings of the Blinn Lumber Company.

Q. Describe them.

A. The lumber extends right up to it, only a little passageway for the team to drive through to get to the south side of the building.

Q. About how near the track are those buildings?

A. Probably not over 20 feet from the side track.

Q. How far north does the building extend?

A. The building is probably nearly 80 feet long.

Q. After you pass above the building of the Blinn Lumber Company, and the office, what obstruction did you find to the east?

A. Nothing until you come to the water tank.

Q. After you come to the water tank, what obstructions?

A. Then the railroad company's buildings and water tank, and a little park.

Q. A little park. What kind of trees?
A. High trees, some of them probably fifty or sixty feet high.

Cross-examination.

By Mr. ALEXANDER:

Q. What first called your attention to that train that night?
A. Well, I started to tell once and you stopped me.
Q. No, I didn't.
51 A. This old gentleman and I was talking about ice; he said, "Is it a through train?" and I said, I don't know.
Q. What first called your attention to it.
A. Looked up and saw the head-light.
Q. About how far off was the train, in your opinion, when you first saw the head-light?
A. Well, it might have been four or five miles away.
Q. Could you see that train continuously until it stopped from where you were?
A. Not all the time; when it passed by those obstructions the train went out of sight and came into sight again very quickly, because it was running fast.
Q. Where were you?
A. In front of the saloon.
Q. Can you designate on here (plat made by defendant) where McQueen's saloon is?
A. Right there (pointing).
Q. Now, could this train be as easily seen from the front of Mr. Tomlinson's store as it could from the front of McQueen's?
A. Yes, sir; the building is altogether—in one building.
Q. You can see the train four or five miles off?
A. Yes, sir.
Q. You were expecting ice on that train?
A. Yes, sir.
Q. Who—the saloon men?
A. Yes, sir; and others sitting generally around.
Q. Expecting ice on that train?
52 A. Didn't know whether it was the ice train or not, exactly.
Q. You say it was about dusk you saw Mr. Tomlinson?
A. The last time.
Q. The last time before you saw him hurt?
A. Yes, sir.
Q. Now, how long was it between the time you saw Mr. Tomlinson about dusk and the time you saw him lying on this track?
A. I couldn't tell exactly.
Q. About what hour the 21*th* of June last was dusk?
A. I don't know exactly; I suppose about 7 o'clock.
Q. Where did you see him about dusk?
A. I saw him go over to the saloon of Mr. Creamer and stand in front of the saloon with a couple of gentlemen.

Q. Did he have anything in his hand?
A. I don't know whether he did or not.
Q. Do you know whether he was going home or not?
A. No, sir; I don't know.
Q. How long was the time between that and the time you saw him lying along the track?
A. It might have been 20 minutes and it might have been a little more.
Q. Had you seen at that time the train coming?
A. Yes, sir; I saw the head-light.
53 Q. He walked up in front of Creamer's saloon and you saw the head-light?
A. Yes, sir; had been talking about it with this old man.
Q. And had been talking about the ice?
A. Yes, sir.
Q. How many people did you talk with about this train that evening?
A. Nobody but the old gentleman mentioned.
Q. In your judgment how fast was the train running?
A. In my opinion I judge about 20 miles an hour; that is my opinion; it might not have been, of course.
Q. Did you notice the stopping of it?
A. Yes, sir; it checked up.
Q. When was it?
A. When it came to the station.
Q. Do you know the cause?
A. I did not know the cause then.
Q. It was not to leave ice, was it?
A. No, sir; I think not.
Q. You didn't know the cause?
A. No, sir.
Q. You say you saw somebody with a light?
A. Yes, sir.
Q. How long was it before you saw the light?
A. Just about when it got still enough to get off.
Q. It was when you were sitting in front of McQueen's?
54 A. Yes, sir.
Q. At the corner, after you pass the corner of this lumber yard, looking up the east, how far can you see a locomotive approaching?
A. You can't see the locomotive very far; you can see the *the* head-light to Picacho.
Q. Suppose you get on the main track, how far can you see?
A. Not much difference.
Q. Can you see just as well from one as the other?
A. Yes, sir; just about; I never tried it, but I judge that.
Q. How far is Picacho?
A. Eighteen miles.
Q. You can see that far?
A. Yes, sir; that is what you can.
Q. Now, you say you were sitting in front of McQueen's saloon

when you saw a man get off with a lantern; now, can you fix about the place on that track where the caboose stood?

A. I think the caboose was about a car and a half east of where Mr. Tomlinson lived; Mr. Tomlinson's house was about opposite the center of the car ahead of the caboose.

Q. In relation to the lumber yard?

A. It was a little past the lumber yard.

Q. Was the lumber yard between you and the caboose?

A. No, sir; I was sitting the other way.

That is all, Mr. Dunbar.

55 JOHN REESE, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Mr. Reese, where do you reside?

A. Here lately at the Reymert mine.

Q. Where were you on the *the* 24th of June, 1891?

A. Casa Grande.

Q. At what particular place in Casa Grande were you about 8 o'clock that evening—about dark that evening?

A. Well, I have been all over Casa Grande, I suppose; I don't know where I was.

Q. Do you remember the circumstance of a train coming in about 8 o'clock that evening?

A. Yes, sir.

Q. Where were you?

A. Sitting in front of Mr. Tomlinson's store.

Q. Did you see Thomas Tomlinson that day?

A. Yes, sir; shortly before he got killed.

Q. Where was he?

A. In front of the store.

Q. Where was the train when you saw it first?

A. Well, I couldn't exactly say; the train was coming west, you know, I couldn't give you the distance.

Q. Well, about how near Casa Grande was it?

A. That I couldn't tell either.

56 Q. State whether or not you saw the train at the time it reached the tank-house?

A. Yes, sir.

Q. About how fast was it running, in your opinion, at that time?

A. At least 15 miles an hour.

Q. Did you see it again after that?

A. Along after the accident I didn't have——

Q. Did you see the train after it left the tank-house?

A. I paid no attention after the accident happened.

Q. Did you see it after it left the tank-house?

A. No, sir.

Q. Did you see it when it stopped?
A. Yes, sir.
Q. Where was that?
A. Right where the accident happened.
Q. What do you mean by "where the accident happened"?
A. Where Thomas Tomlinson got killed.

By the COURT:

Q. Where was that? There has been no testimony of that.

Mr. ISRAEL, resuming:

Q. Did you see Mr. Tomlinson after that night?
A. I did.
Q. Where.
A. I saw him lying on the side of the track.

57 Q. Look at this map (defendant's map). Supposing these places marked—this place marked "Tomlinson's store" to be the point in Casa Grande where his store is located, and this marked "Tomlinson's residence," to be his residence, these blue lines to be the tracks and switches, and this supposed to be the lumber yard, and the building marked "depot" to be the passenger depot—where was Mr. Tomlinson lying?

A. Nearly on a bee-line from the store to his house, on the track; that is nearly the line (line on map) where he lay dead or nearly dead.

Q. Did you see the train where it was that night?
A. Yes, sir.
Q. From the time you saw it at the water tank and where it stopped, what signals did they give by ringing of bell or blowing of whistles?
A. Didn't ring any bell or blow whistle.
Q. When the engine of the train got to that point where you afterwards saw Thomas Tomlinson lying, what, if anything, was done by the train?
A. I couldn't tell; when I saw him wounded I didn't know what I did afterwards.

The COURT: He is asking you before that.

By the COURT:

Q. When the train got to the point where you afterwards saw Thomas Tomlinson what did it do, continue its speed or check or go faster?
A. It stopped.

Mr. ISRAEL, resuming:

Q. Quick or slowly?

58 A. Quick as power could do it—certainly.

Q. How long a space of time was it from the time the train checked until you saw Mr. Tomlinson?
A. I was over there shortly after he got hurt.

Q. Can you designate it in minutes?
A. No, sir.
Q. How long did you remain on the porch?
A. As soon as the train stopped I went over.

By the COURT:

Q. Did you go immediately over as soon as the train stopped?
A. Yes, sir.

Mr. ISRAEL, resuming:

Q. How was he laying?
A. Laying north of the main track, head east
Q. Was he between the main line and the switch line?
A. I don't know anything about the lay of the country—nothing; I never paid any attention to it.
Q. What was Mr. Tomlinson's condition when you got there?
A. I knew that he was a dead man when I came over there; I had my hand on his wound.
Q. What was it?
A. The wound on his head.
Q. Anything else?
A. I picked up the fleshy part of his heel, cut out.
Q. Did you see Mr. Tomlinson after that, the night of the accident?
A. Yes, sir; I staid up all night that night.
59 Q. When did he die?
A. Something like two hours afterwards.
Q. Did you go with him from where he was found on the railroad track to where he died?
A. Yes, sir.
Q. Now, from the time he was taken up on the railroad track, up to the time he died, did you make any examination of his wounds?
A. No, sir; I don't know anything about dressing wounds.
Q. After he was dead?
A. Yes, sir; examined the whole thing.
Q. Describe the wounds as minutely as you can.
A. The head was crushed in right in the center here.
Q. Skull broken?
A. Yes, sir; certainly.

By the COURT:

Q. The top of the head?
A. Yes, sir.

Mr. ISRAEL, resuming:

Q. Any other wounds on his body?
A. The heel was cut off, showed the round bone of the heel.

Take the witness.

Cross-examination.

By Mr. ALEXANDER:

Q. About what time in the evening did you say you saw Mr. Tomlinson after he was hurt?

60 A. I couldn't give you the exact time; it was after dark.

Q. Where was he at the time you saw him after dark?

A. I didn't pay any attention to him before the accident happened.

Q. You say you saw him about dark. Where was he at that time?

A. I don't remember; this is a thing I didn't pay any attention to.

Q. Well, was it at the depot?

A. I saw him in front of his own house.

Q. Then you do recollect?

A. Yes, sir.

Q. What was his condition; was he in good sober condition or under the influence of liquor?

A. Perfectly sober.

Q. What sort of a man was Mr. Tomlinson in his lifetime—a stout, hearty man?

A. He was a sort of a man to my notion—a very fine sort of a man.

Q. At the time you saw Mr. Tomlinson at his house how long did you stay there?

A. I was not over at his house that night.

Q. You stated just now that you saw Mr. Tomlinson about dusk.

A. Yes, but not at his house—not at his residence.

Q. What house did you mean?

A. I mean at his store.

61 Q. Yes, sir; about dusk on the evening Mr. Tomlinson got hurt you saw him at his store?

A. Yes, sir.

Q. What was he doing?

A. That I couldn't tell you—of course I couldn't tell you; I couldn't tell what a storekeeper does in this town.

Q. Was the store open then?

A. No, sir.

Q. Where were you?

A. In front of his store.

Q. Was the store open at that time?

A. Not at the time of the accident.

Q. I mean at the time you saw this train; was it before or after you saw this train?

A. Certainly, after dark.

Q. Then you were in front of Mr. Tomlinson's store when you saw this train?

A. Yes, sir.

Q. Where was Mr. Tomlinson then?

A. I didn't pay any attention.

Q. Was the store opened or closed?
A. Closed.
Q. Mr. Tomlinson wasn't in the store?
A. I tell you I didn't pay much attention; it was no difference to me.
Q. About what time was it dark on the 24th of June?
A. I couldn't tell; I am not an astronomer.
Q. You could take a common, ordinary almanac, couldn't you, and find out?

62 Mr. ISRAEL: Object.

Q. About what time did you see Mr. Tomlinson last alive?
A. About 8 o'clock in the evening.
Q. Where?
A. At his store.
Q. At his store; store open?
A. Store closed; I saw him in front of the store. Wish you don't ask me about that again.
Q. About 8?
A. Yes, sir; guessing at it.
Q. How long after that was your attention called to this train?
A. The train that killed him?
Q. Something killed him, I suppose. Take your idea; how long was it after you saw him?
A. You know how a thing of that kind goes; you can guess it yourself.
Q. Guessing don't go.
A. I ain't trying to guess.
Q. How far off was it when you saw the train—a mile?
A. A mile, anyhow.
Q. How long after this did you see Mr. Tomlinson—in connection with seeing the train, when your attention was first called to the train, about dusk, or, as you say, about 8 o'clock, what was the difference between those two times?
A. A very short distance in the time, you know.

63 By the COURT:

Q. Did you see Thomas Tomlinson after you saw the train?
A. No, sir. Somebody said, here an accident happened, and we went over and found Thomas Tomlinson lying on the side of the track, dead.
Q. Did you see Thomas Tomlinson in front of his store after you saw the train?
A. No, sir.

Counsel resuming:

Q. What first called your attention to the train that evening?
A. Nothing particular.
Q. Was there any particular matter that called your attention to the train?
A. Nothing whatever.

Q. You say the whistle didn't blow. How do you know?
A. I didn't hear it.
Q. You didn't hear?
A. No, sir; I am pretty good hearing.
Q. Did you hear any rumbling of the train?
A. I tell you I didn't pay any attention to a thing of that kind.
Q. What called your attention to it. Was it an accident or what called your attention to it?
A. How could I expect an accident?
Q. Was there anything called your attention to it more than you happened to be looking eastward and saw a light—the head-light?
A. I didn't pay much attention whatever.
64 Q. You didn't expect ice on it?
A. No, sir.
Q. Do you know of anybody else that was expecting ice on it?
A. Couldn't tell you.
Q From where you stood in front of Thomas Tomlinson's store you saw the head-light in the distance a mile or two off?
A. Yes, sir; I admit a mile off.
Q. And immediately afterwards you went over to where this accident happened—where Mr. Tomlinson got hurt?
A. Certainly, yes.

Mr. GEORGE ATCHISON, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Where do reside?
A. Casa Grande.
Q. Where were you residing on the 24th of June last?
A. Partly at the Lake Shore mine and partly at Casa Grande.
Q. Do you remember the circumstance of a train coming in about that time?
A. Yes, sir; came in at dark.
Q. Where were you at that time?
A. Sitting in front of Mr. Tomlinson's store.
Q. When did you first see the train that evening?
65 A. I don't remember.
Q. Did you see it after it left the water tank?
A. Just passing, just at the water tank.
Q. Did you see it after that?
A. In Casa Grande—in town.
Q. About what direction from where you were sitting, how near the depot?
A. At the depot.
Q. From the time you saw it at the water tank and the time you saw it at the depot, could you see it?
A. No, sir.
Q. For what reason?
A. Obstructions.

Q. Look at this diagram (afterwards Defendant's Exhibit "A"), supposing the top of the plat to be north; supposing this to be the lumber yard, the point marked "Tomlinson's store" to be the place in Casa Grande where his store was situated, and supposing these double blue lines extending across the map to represent the main track of the railroad company, the upper and lower ones the side tracks, and this point marked "depot" to be the place where the passenger depot is situated in Casa Grande, and the place marked "tank" to be the watering-house—describe what the obstructions were.

A. The obstructions here is this office; it is a frame building about 80 feet long; the obstructions of lumber piles which stand up here from the office down to this point here—about 125 feet, I should judge, from the depot building—is this lumber pile; that is the obstruction.

66 Q. What was the width and height of that obstruction on the 24th of June?

A. Well, the width, that would be about—it varied according to the lumber piled there.

Q. Well, what was the highest?

A. Couldn't say.

Q. How did the lumber lie there, parallel to the track or at right angles?

A. Right angles.

Q. About what length of lumber?

A. Some longer and some shorter; 30 and 40 feet long.

Q. Drawing your attention to the place marked "office" and place marked "tank" and the point marked "Tomlinson's store" and taking the distance 20 or 25 feet south of the store, could you see the train after it left the tank and got to the end of the lumber pile?

A. No, sir.

Q. What time did it come there?

A. Shortly after 8 o'clock.

Q. After it left the tank-house and before it reached the depot how fast was it going?

A. Eighteen to twenty miles an hour.

Q. What signals was it giving?

A. None whatever.

Q. Did you notice whether that train stopped that night at any time—at any point between the water tank and lumber pile?

A. No, sir.

Q. You say the train didn't stop?

67 A. It didn't stop until it got beyond the depot.

Q. When did it begin stopping, if you know?

A. When it got to the depot.

Q. *Do* you go over to the train after it stopped?

A. Yes, sir.

Q. Did you see Thomas Tomlinson after you got to the train?

A. I saw him lying alongside the track.

Q. Indicate where you saw him lying, supposing that point to be the depot, that marked "Tomlinson's store" to be his store, and that his residence.

A. On the north side of the track.

Q. What direction from the lumber pile?

A. South of the lumber pile.

Q. How far east or west of the corner?

A. Couldn't say.

Q. Well, about?

A. Couldn't be positive.

Q. Couldn't you give us an idea how far east or west from the size of the space between the rails?

A. Ten or fifteen feet from the lumber pile.

Q. West or east?

A. East.

Q. What condition was he in?

A. Dying condition.

Q. Did you make any examination of him?

A. Yes, sir.

Q. Describe his condition.

A. The skull was fractured; heel entirely cut off.

Q. Who else did you see there at that time?

68 A. Some railroad employees and other people there.

Q. How long had you been in Casa Grande prior to the 24th of June, 1891?

A. Well, about three months.

Q. Did you live there during that three months?

A. No, sir; I was working at the Lake Shore.

Q. How much of that three months had you been at Casa Grand?

A. None at all.

Q. Prior to that?

A. In March.

Q. Have you lived there at any time?

A. About two weeks.

Q. How long have you lived in Casa Grande and the vicinity of Casa Grande?

A. About ten years, off and on.

Q. During these ten years have you had occasion to visit there?

A. Yes, sir; when I have had business.

Q. Do you know what the custom of the people of Casa Grande, if there has been any, was as to crossing this railroad track at and about the point where you saw Mr. Tomlinson lying—before this accident?

A. They cross it variously—at no particular point.

Q. Whether or not this point was——

A. Well, promiscuously.

Q. At this place?

Mr. ALEXANDER: He didn't say that.

69 The COURT: He is asking about that particular place.

Q. Where do the people living on the south side of the track, between the lumber pile and the depot, cross from the north side to the south side?

A. Sometimes cross at one point and sometimes another.

Q. Right at the lumber pile?

Mr. ALEXANDER: Don't put it in his mouth.

Q. What is there in the way of obstructions to prevent people crossing—between the stores on the north and the dwellings on the south—what is the obstruction?

A. None.

Q. What is the character of the ground?

A. Solid.

Q. Rough or smooth?

A. Smooth—ashes.

Q. Take the witness.

Cross-examination.

By Mr. ALEXANDER:

Q. Where were you sitting when you saw this train approaching?

A. In front of Mr. Tomlinson's store.

Q. Where was the train?

A. West of the tank.

Q. Do you know the place where the railroad company generally makes its signal coming into Casa Grande from the east?

A. No, sir.

70 Q. How do you know there was no signal that night?

A. I didn't hear any.

Q. You didn't hear any; that is all you know about it? Don't you know the whistling post is east of the tank?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

Q. Your attention then wasn't called to this train until you saw it about the tank?

A. I was not looking after it.

Q. I am not asking that. Your attention was not called to the train until you saw it about the tank?

A. At the tank? I saw the head-light.

Q. How long after that did you see the head-light again?

A. Right at the depot.

Q. Were you looking for the head-light all that time?

A. No, sir; I was not.

Q. Who was there with you at the time you were in Mr. Tomlinson's store?

A. Who was there with me at the time I was in Mr. Tomlinson's store?

Q. In front?

A. Mr. Ferry and Mr. Traut, who is now dead, all sitting down together.

Q. No other persons present?

A. No, sir.

71 Q. At what time was that in the evening?

A. Ten minutes to a quarter past eight, more or less.

Q. Did you see Mr. Tomlinson there?

A. No, sir.

Q. Was Mr. Reese there?

A. Sitting in front of the store.

Q. Reese was?

A. Yes, sir.

Q. Did you see Mr. Tomlinson during the day, at any time of the day—the 24th?

A. Two o'clock in the afternoon.

Q. And didn't see him any more until you saw him hurt?

A. Yes, sir; I was with him from about six o'clock in the evening to the closing of the store.

Q. About what time did he close the store?

A. About eight o'clock, I think.

Q. Do you know where he went then?

A. I can't say; he went outside, closed the store.

Q. And do you know where he went from there, after he got outside?

A. I don't know.

Q. He was not in the store, was he?

A. No, sir.

Q. You didn't see him any more at the store, nor until the time of the accident?

A. No, sir.

Q. Now, Mr. Aitchison, looking at this map, supposing you were going from Mr. Tomlinson's store and then over to his house,

72 after you passed the corner of the lumber yard could you have seen the head-light that night?

A. When you got right there on the track you could see the head-light, but you couldn't see it with the obstructions of the lumber pile there.

Q. When the lumber piles were between you and the head-light you couldn't see it, but the moment you passed the corner you could see it?

A. If there was no other obstruction in the way.

Q. Did you notice whether it was clear that night or not?

A. No, sir.

Q. Did you notice any cars on the side track?

A. No, sir.

Q. Your attention was called to it?

A. No, sir.

Q. About how far is from the corner of the lumber yard to the side track south?

A. I don't know.

Q. How far is from the side track to the main track?

A. I don't know.

Q. If you were walking on this dotted line, if there was no obstruction beyond the lumber pile, you could see the head-light, looking east?

A. If I was looking east.

Q. If a train was approaching from the east couldn't you hear the rumbling?

A. No, sir.

Q. How far can you hear it?

A. Can't say.

73 Q. If you were crossing and walking southeast, wouldn't you naturally look up the track?

Mr. ISRAEL: Object.

The COURT: Objection sustained.

Q. This tank is about how far from the depot?

A. About 500 yards, as near as I can give it.

Q. Now, at the time your attention was first called to this train at or near the tank, how long after that was it that your attention was called to the accident that happened to Mr. Tomlinson?

A. A very short time.

Q. Was it ten minutes?

A. No, sir.

Q. Was it five minutes?

A. Couldn't say; don't know.

Q. Was it more than five minutes?

A. I don't know.

Q. You have no idea?

A. No, sir.

Q. You know it ain't ten?

A. No, sir.

Q. Who first told you about the accident happening to Mr. Tomlinson?

A. Well, no one told me all about the accident, any more than I saw some one going with a light towards where the accident was, but I couldn't tell who it was or anything about it.

Q. Then you don't know who called your attention to it?

A. I called my own attention to it; I was sitting looking over towards the depot.

74 Q. Did you see Mr. Tomlinson struck?

A. No, sir.

Q. How did you know he was hurt?

A. I saw some one running with a light—because Mr. Ferry said to me while we were talking, he said, if there is any one hurt, that will be a dear thing for that company.

Q. You say you don't know where Mr. Tomlinson went after he closed the store?

A. I supposed he went home.

Q. You didn't know it?

A. No, sir.

Q. Did you see him any more until you saw him on the track?

A. No, sir.

Q. That is all.

Redirect.

By Mr. ISRAEL:

Q. What prevented you from seeing the head-light burning after it left the tank to the time you saw it down to the depot, if anything?

A. I didn't pay any attention.

Q. Was there anything to prevent you from seeing?

A. After it passed the lumber piles I saw the head-light.

Q. What prevented you from seeing it?

A. I could have seen it if I had looked. There was nothing to prevent my seeing it from the tank down here (pointing on map).

75 Q. From the point marked "passenger depot," and the point marked "tank," was there anything to prevent you seeing it?

Mr. ALEXANDER: He has already testified to that.

Q. Suppose there were one, two or more box cars on the side tracks to the east, could you have seen it then?

A. No, sir.

By Mr. ALEXANDER:

Q. That night as you went on that side track and crossed it, I understand you to say that Mr. Tomlinson's body lay about ten to fifteen feet east of that lumber pile?

A. Yes, sir.

Q. You had to walk up the track a little distance?

A. Yes, sir.

Q. Did you see any box cars there?

A. I don't remember.

Q. Even if there had been, Mr. Aitchison, two box cars standing on this side track, between the corner of this lumber pile and the tank, and you had come around that corner, do you tell this jury you couldn't see that head-light on account of those box cars?

A. No, sir.

JAMES CREAMER, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

76 Direct examination.

By Mr. ISRAEL:

Q. Where do reside?

A. Casa Grande.

Q. Where were you on the 24th day of June, 1891?

A. Casa Grande.

Q. Where were you about eight o'clock—about dark?

A. Sitting in front of my saloon.

Q. Do you remember the circumstance of a train coming in about that time from the east?

A. Yes, sir.

Q. Where were you at the time that train came in?
A. Sitting in front of my saloon.
Q. Did you know Thomas Tomlinson in his lifetime?
A. Yes, sir.
Q. Had you seen him that evening?
A. Yes, sir.
Q. About how long before the train came in?
A. About twenty minutes.
Q. Did you see him leave the saloon?
A. Yes, sir; saw him coming out.
Q. Did you pay any attention to where he went to?
A. No, sir.
Q. When did you see him next after that?
A. That is the last time I saw him.

77 Q. Did you notice that train coming in?
A. Yes, sir.
Q. Where was it when you first saw it?
A. It was out seven or eight miles when I noticed it first.
Q. How much of the time from that time until it got to the depot, did you see it?
A. Well, I kept looking at it every little while.
Q. Did you see it when it got to a point at or about the water tank?
A. Yes, sir.
Q. When did you see it again?
A. When it got to the Blinn Lumber Company's house and passed the lumber piles.
Q. On the west of the lumber pile?
A. Yes, sir.
Q. During that time what signals was it giving?
A. Didn't hear any.
Q. You didn't hear any?
A. No, sir.
Q. About how fast was it running between the tank and the depot?
A. Running very rapid; I should think about eighteen or twenty miles an hour.
Q. Did you notice the train check or stop before it got to the depot?
A. Yes, sir; when it was about opposite my place they put on the air brakes and checked her up; you could hear the steam.
Q. Suddenly?
A. Yes, sir; very sudden.

78 Q. Where is your place?
A. Right here (points on map).
Q. The place marked "saloon" immediately to the west of the place marked "Tomlinson's store"?
A. East.
Q. Did you see Thomas Tomlinson again that night?
A. Yes, sir; after he was hurt.

Q. Where was he lying?

A. Between the main track and the side track, a few feet west of the lumber pile.

Q. How close to the main track?

A. Between the main and the side track; about three or four feet from the rails of the main track.

Q. What condition was he in?

A. Lying kind of sideways, and had a wound on his head; blood coming out here; another wound here; he had his heels kind of cut off, and was insensible.

Q. Bleeding from the head?

A. Yes, sir.

Q. Did you look at the wound in his head?

A. Yes, sir.

Q. Could you state whether or not the skull was fractured?

A. Yes, sir; I think it was fractured.

Q. Did you see him any more that night?

A. Yes, sir; I was around there two or three times afterwards; kept going off and on.

Q. What was his condition when you last saw him?

79 A. He was insensible; I saw him about half an hour before he died.

Q. What time did he die?

A. About twelve o'clock that night.

Q. How long have you lived in Casa Grande prior to June 24th, 1891?

A. About a year and a half.

Q. Are you in business there?

A. Yes, sir.

Q. Now, I will ask you, taking that portion of the railroad company's right of way and the switches between the passenger depot and the water tank, the streets of Casa Grand and the buildings which would be upon the north side of the railroad track, designated by the places on the map marked "Tomlinson's store," "saloon," "restaurant," "barber shop," and on the south by the places marked "Smith," and "Reeds" (?), and bounded on the west by the place marked "depot" and on the east by the place marked "tank"—what is the custom as to crossing in that space of ground on the track between the depot and the lumber yard?

A. They generally cross at any point. Now, I live on the south side of the track and I generally cross——

The COURT: No matter.

A. They cross it anywhere.

Q. How as to that place where Mr. Tomlinson crossed?

A. I have seen a whole lot of persons cross there.

Q. How about the passenger trains that stop there, where do they stop?

80 A. The engine generally stops in front of the depot.

Q. Do they extend back as far as the lumber pile?

A. Yes, sir.

Q. Have you seen people get off as far back as the lumber yard?
A. Yes, sir.

Mr. ALEXANDER: Move to strike out that last answer as immaterial and irrelevant.

The COURT: As to discharging passengers?

Mr. ALEXANDER: Yes, sir.

The COURT: Motion overruled.

Mr. ALEXANDER: Except.

Cross-examination.

By Mr. ALEXANDER:

Q. What first called your attention to the train that night?
A. Well, sir, it was a very warm day and I expected some ice on 22 that night; when I first saw the train of course I thought it was 22; I kept looking down, and when it passed the tank-house I made the remark, It ain't going to stop; because when 22 passes the tank-house it rings the bell and runs very slow; that train didn't ring any bell, they put on the air brakes very sudden and I made the remark, They will stop, then, and we will have some ice. Then a man came over and said, "Is there an officer here?" I said, Yes; Mr. Cummings was sitting beside me; I said,
81 Yes; I went over there, I was the first man there; one of the railroad men was standing over him with a lantern; he asked me if I knew him. I looked at him—had to look pretty close to recognize him; I said, Yes, that is Mr. Tomlinson; about that time a whole lot of people came in there.

Q. You saw that head-light seven or eight miles?
A. Yes, sir.
Q. And you saw it continuously?
A. Yes, sir; until it got down back of the tank-house.
Q. You spoke of it running rapidly; what do you call rapidly for a railroad train?
A. Well, they were running faster than usual through Casa Grande; I should call running through a station at the rate of eighteen or twenty miles an hour rapid.
Q. You would call that running rapidly through a town?
A. Yes, sir.
Q. What means have you of judging of the rate of speed it was running?
A. That is merely my opinion.
Q. Now, if a passenger train was going through there at the same rate, would you consider that rapid?
A. I should think so.
Q. In regard to the time that you saw Mr. Tomlinson last in your saloon, about what time was it then?
A. Just a little before dark; I should judge between half past seven and eight o'clock.
Q. That is the last time you saw him that day alive or until you saw him hurt?
82 A. Yes, sir.

Q. Did you see him at your saloon again?
A. No, sir.
Q. Did you see him again on the north side of the track?
A. No, sir.
Q. You say you cross this track pretty often?
A. Yes, sir.
Q. Doing business on the north side and live on the south side?
A. Yes, sir.
Q. Now, in crossing these tracks, supposing you were going directly south, if you cast your eyes east how far could you see a train coming?
A. From my porch I could see it away off.
Q. I am not speaking of that; after you passed the lumber piles and got on the tracks, how much space do they take?
A. I couldn't say; twenty-five or thirty feet.
Q. Not less than that?
A. I don't think so.
Q. If you were crossing those tracks, say you were on the main track, how far east could you see a train approaching?
A. Eighteen or twenty miles.
Q. At night you could see it further than you could in the daylight?
A. Yes, sir.
Q. And at either of these tracks, after you got on either of those tracks and cast your eyes to the east you could see it about the tank if it was coming?
83 A. Yes, sir.
Q. Easily?
A. Yes, sir.
Q. Now, I understand you to say that your attention was called to this accident by one of the trainmen.
A. Yes, sir.
Q. And you were the first man that got there?
A. Yes, sir.
Q. Mr. Aitchison wasn't there?
A. No, sir.
Q. Nor Mr. Elliott?
A. No, sir.
Q. And your attention was called to it by some of the trainmen?
A. Yes, sir.
Q. Where was the caboose?
A. The caboose and about half a car was past the corner of the lumber pile.
Q. East of the lumber pile?
A. Yes, sir.
Q. Did you notice where the engine was stopped at that time?
A. Yes, sir.
Q. About where was that? Indicate it on the map; this is supposed to be the depot building.
A. It stopped about here (pointing on map).

Q. West of the depot?

A. West of the depot. Yes, sir.

Q. Now, you heard no whistle that night, did you?

84 A. No, sir.

Q. Was you paying any attention to hearing a whistle?

A. No, sir; but for the bell I was, because when they passed the tank-house they generally slack up and ring the bell and pull in slow when they stop.

Q. That is all.

By Mr. ISRAEL:

Q. Supposing that upon the night of the accident there had been one or two or more box cars immediately beyond the lumber yard, could a person have seen the train coming on the main track when they stepped out on the side track?

A. No, sir.

By Mr. ALEXANDER:

Q. Do you understand that? If a person stepped out on the side track, out beyond the lumber pile, couldn't you have seen the head-light at the tank? If you stood right in the middle of that north side track and there were two box cars standing there, about here somewhere (pointing on map), couldn't you look up here and see the head-light flash through the box cars?

A. I should think so.

Q. Around the box cars?

A. Yes, sir.

Q. Coming from Mr. Tomlinson's residence, coming across towards the saloon or store is there any obstructions?

A. No, sir.

Mr. CAMPBELL: On the night of the 24th of June, '91.

85 By Mr. ISRAEL:

Q. Would or would it not depend on how close these box cars were standing on the night of the 24th of June as to whether or not you could see the head-light or not, at or past the tank?

A. Yes, sir.

At this point the court took a recess until 8.00 a. m. to-morrow, the jury being admonished by the court, and excused until that hour.

FLORENCE, *June* 7, 1892—8.00 a. m.

After recess. All present.

Mr. G. W. CUMMINGS, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

(Digest of evidence:) I live in Casa Grande and lived there on the 24th of June last; about 8.00 p. m. I was in town and remem-

ber the train coming in from the east; I was sitting on the porch in front of Creamer's saloon; the train was coming two or three miles away when I first saw it; did not see it constantly until it got to the depot; I noticed it just as it passed the water tank; it was running very fast then; after it left the water tank I next saw it after it passed the lumber yard, to the west of the lumber yard; couldn't see it all the way from the tank to the depot, the lumber yard and the office of the lumber company interrupted the
86 view; there were two or three box cars standing on the side track; the train began to check up just before it arrived at the depot; just at the lumber yard they throwed the brakes on—between the lumber yard and the depot.

Q. Did you go over to the train?

A. I went over after it stopped.

Q. About how long was that after it began checking?

A. I don't think it was more than a minute.

Q. What did you find there, if anything?

A. Found Mr. Tomlinson lying on the ground.

Q. Look at that map; describe where he was lying, and fix about the place upon that map (afterwards Defendant's Exhibit "A") (counsel describes points on map) about where he was lying, how close to this lumber pile.

The COURT: Every inch on there represents 50 feet.

A. I couldn't tell; just above it.

Q. How close to the main track?

A. I guess about three feet.

Q. Which way was he lying?

A. With his head to the east, lying parallel to the track.

Q. What position was he lying?

A. His face was down on the ground; he was lying sort of on his right side, his face on the ground—the dirt.

Q. Was he or not parallel with the track?

A. He was parallel with the track.

87 Q. Did you make any examination of him at that time?

A. Nothing more than I took hold of his head and turned it up; I saw the blood running down.

Q. Where was he bleeding from?

A. From his head.

Q. Any other wounds on his person?

A. One of his heels cut off.

Q. Which foot?

A. Left foot, I believe; I ain't sure.

Q. Who else did you see there at that time when you first arrived?

A. When I first went there, there was one of the trainmen came over with a lantern.

Q. Came from whence?

A. From the train.

Q. Where to?

A. To where I was sitting in front of Creamer's saloon, outside the saloon.

Q. What did he say when he came over there?

A. Asked if there was an officer there.

Q. Anything else?

A. Said that there was a man hurt over there, and he wanted an officer.

Q. Now, from the time you saw that train until you saw it checked and during the time it was passing behind the obstructions you speak of, were any signals given, bell rung or whistle blown?

A. I didn't hear any.

Q. If any had been given would you have heard any?

88 A. The whistle might have been blown; if there was any blown I didn't hear it; there was no bell rung.

Q. Can you say there was any whistle blown between the tank-house and the depot?

A. Never blown between those points.

Q. Describe what obstructions there are on the railroad track east of the depot and between the depot and the tank-house?

A. There was a lumber yard and office (examining map);—I guess that is the office.

Q. Intended for office—marked "office."

A. There is lumber from there up to where the train stopped.

Q. Describe those lumber piles as to their width and height at that time.

A. Some of them were higher than others; the lumber was piled up pretty high at the lower end of the lumber yard, up towards the depot.

Q. What do you call "high"?

A. Eight or ten feet high; eight feet high; maybe some of them were higher; pretty high piles.

Q. And about how long was that lumber?

A. It was different lengths; some of it runs all the way from twelve feet up to twenty-four.

Q. How was it lying, parallel with the track or at right angles?

A. Right angles.

Q. What was the length of the lumber?

The COURT: He says twelve to twenty-four feet.

89 Q. That is what I understood. Drawing your attention to the railroad tracks; I don't know what the word is; drawing your attention to this track marked "house track" or what is really the north switch—that is the switch next to the lumber yard—what, if anything was upon that switch that night?

A. There was some box cars upon the track that night.

Q. About where were those box cars standing in relation to the corner of the lumber pile, that scale being 50 feet to the inch—on that night?

A. About there (pointing on map).

Q. (To defendant's counsel): Will you allow the witness to designate with the letter "B" the point?

Mr. ALEXANDER: Oh, yes.

(Witness marks point.)

Q. About how far from the west corner of the lumber pile was it in feet to where the box car stood—50 or 60 feet?

A. About two car-lengths from the west corner of the lumber pile—60 or 75 feet.

Q. Take the witness.

Cross-examination.

By Mr. STONE:

Q. Mr. Cummings, where were you sitting when the train came in that night?

A. I was sitting in front of Creamer's saloon, outside on the porch.

Q. Where was the train, or about where, when you first saw it?

90 A. It was coming from towards Tuscon, about two or three miles east of Casa Grande when I saw the head-light.

Q. Was there any conversation among the persons sitting there with you and yourself regarding the train or any remarks made about it?

Mr. CAMPBELL: Object.

The COURT: Objection sustained.

Q. You said there might have been a whistle that night that you didn't notice.

A. It might have whistled at the mile whistling post; I wouldn't say it didn't whistle.

The COURT: There are two whistling posts there, aren't there?

Mr. ALEXANDER: Yes, sir; one at a quarter and one at a mile.

The COURT: The one at a quarter of a mile is the crossing post and the one at a mile is the station whistling post?

Mr. ALEXANDER: Yes, sir.

Q. Do you notice the bell and whistle of the trains that come into Casa Grande there usually?

A. Yes, sir.

Q. Did you pay particular attention to this train that night to determine whether the bell was ringing or not?

A. Well, I was talking about the train.

Q. No matter about that; just answer the question.

A. I did pay particular attention.

Q. At what point do they usually begin to ring the bell coming into Casa Grande?

91 A. They begin to ring the bell between the tank-house and the depot.

Q. Did you notice the train as it came in after it passed the Blinn Lumber Company's office particularly?

A. I was setting there— yes, sir.

Q. You could see it as it came along all the way, couldn't you?

A. No, sir; not all the way.

Q. What part of the way?

A. Could see it only where there was gaps between the tank-house and the depot; there was places you couldn't see it.

Q. How much of the way?

A. I couldn't tell you—where the lumber is, where the office is, and where the box cars were.

Q. How much of the track was obscured by the lumber; how much of the train coming in was obscured by the lumber pile between you and the train—how many feet?

A. Well, I never measured the distance; I couldn't tell; it is from the upper end of the lumber yard to the office—just below the office; you couldn't see the train for the office; it was angling and you couldn't see it after it passed the office, until it came to the open space.

Q. Then the whole length of the lumber yard as marked on that map covered the points obscured by the train?

A. There might be some places where it was not so high.

92 Q. That is what I want to know. What points were not so high?

A. There is high piles of lumber nearly all the way down; some piles were low; it is different kinds of lumber and some of them were low.

Q. That is what I want to know, how much of the distance was high enough with lumber to obscure the train, sitting where you were?

A. Well, this is all high piles up here at this lower end.

Q. As high as the lumber was piled a week ago Sunday?

A. It was considerable higher.

Q. Where were the low piles of lumber? You say some were higher than others.

A. Down towards the office there were some piles that wasn't so high.

Q. Were there piles a hundred feet from the west end that were not so high?

A. Yes, sir.

Q. How much space did those high piles at the west end of the lumber yard occupy—how many feet of the track?

A. Sixty or seventy feet, I guess, somewhere along there.

Q. Did they unload the lumber from the cars along there?

A. Yes, sir.

Q. Did they pile the lumber up as high as the top of the cars?

A. No, sir; I don't think they did.

93 Q. Which is the higher, the place where you sat on the porch of Creamer's saloon or the railroad track? Which is the higher elevation?

A. I couldn't tell you; I don't think there is much difference.

Q. Which is the higher, the porch of Creamer's saloon or Tomlinson's store?

A. There is a swag between; they are both elevated?

Q. Which is the higher?

A. I guess they are about on a level; I didn't notice particularly.

Q. Can you get as good a view of the railroad track looking easterly from the porch of Creamer's saloon as you can from the porch of Tomlinson's store?

A. About the same view.

Q. How high do you think the highest of the piles of lumber were?

A. It was eight or ten feet high.

Q. Well, which.

A. Well, I couldn't say.

Q. Will you say positive that any pile of lumber there was eight feet high above the ground at that time?

A. I will say positive that I think it was; I don't know positive, for I never measured; I might be fooled.

Q. When did you notice the box cars on the track that you spoke of just now?

A. Noticed them that night.

94 Q. What time that night?.

A. It was after that; I passed backwards and forwards from one side to the other several different times.

Q. Well, of course. What time?

A. Well, I would say between eight and ten o'clock.

Q. What time did the accident occur?

A. I think it was a ltttle after eight.

Q. Fully two hours after the accident that you noticed any cars there?

A. No, sir; I was over at the track immediately after the accident happened.

Q. How far from the caboose as the caboose was standing, or the place where it was standing after the train stopped, after the accident you have testified to, were the box cars?

A. Right close.

Q. How far, which way from the caboose?

A. At that time I didn't pay no attention to the distance.

Q. Did you notice where the caboose was at the time that the train was stopped there?

A. Yes, sir.

Q. Where was it?

A. The caboose stopped just before it passed the end of the lumber yard.

By Mr. ISRAEL:

Q. Just before what?

A. Before it passed the end of the lumber yard. The caboose didn't pass the lumber yard.

95 Mr. STONE, resuming:

Q. Which direction were those box cars from that point where the caboose stopped?

A. They were on the north side track, pretty close to where the caboose stopped.

Q. Well, which direction, easterly or westerly?

A. Well, it might have been a few feet east.

Q. Easterly?

A. Not very much.

Q. Are you sure they were box cars; might they not have been flat cars?

A. No, sir; they were box cars.

Q. What called your attention particularly to them?

A. I was passing there; I was on the track; I saw them there frequently; they was box cars.

Q. Speak out loud.

A. I was passing by frequently to where my room was.

Q. At what time did you see Mr. Tomlinson that night?

A. Was that before the accident or afterwards?

Q. Before the accident.

A. I saw him fifteen or twenty minutes before.

Q. Where was he then?

A. He was standing right outside of his store. There was three or four of us together, standing there talking.

Q. Was that the last time you saw him before the accident?

A. Yes, sir.

96 Q. Did you notice which way he went from there?

A. I did not.

Q. Now, you are as certain of seeing those box cars on that track that night about ten o'clock as you are of anything you have testified in this testimony?

A. I am certain I saw them there that night.

Q. As early as ten o'clock?

A. Yes, sir.

Q. As you come around the lumber pile, crossing the railroad—as you come across here approaching the railroad track, how far can you see a train of cars coming in the evening?

A. After you get on the track you can see it a good ways.

Mr. ISRAEL: You mean the main track or north side track?

By Mr. ALEXANDER:

Q. What do you call a "good ways"?

A. Fifteen or twenty miles; you can see up to Picacho.

Mr. STONE, resuming:

Q. Can you see it from the porch of Mr. Tomlinson's store about an equal distance?

A. No, sir.

Q. About how far can you see the head-light of a train approaching from the east from the porch of Mr. Tomlinson's store or Creamer's saloon?

97 A. I guess there is one place about two miles and a half or three miles you can see it, but the trees and other things——

Q. How far away can you see the head-light of a train approaching from the east, sitting in front of Creamer's saloon or Tomlinson's store?

A. You can see it two and one-half or three miles.

Q. Is that as far as you can see it?

A. I think so.

Q. Can't you see it seven or eight miles?

A. You might, I ain't sure.

Q. Can't you see it nine or ten miles?

A. No, sir; not from this side.

Q. Well, coming around that lumber pile, just as you pass the lumber pile, looking easterly, can you see an approaching train within a mile—or a mile distant, I will say?

A. Before you get on the track?

Q. Yes.

A. I don't know whether you can or not; I guess you can see it.

Q. You don't know?

A. I don't know for certain; you might.

Q. Can you see a train at the tank as you come around the lumber pile first?

A. On the side track, yes.

Q. Can you at the whistling post, the mile post?

A. I don't think you can see it a mile, from the side track.

98 Q. You can see it at the tank, coming around the lumber pile as you first emerge from behind the lumber pile?

A. Yes, sir.

Q. After the accident who went with you to the place where Mr. Tomlinson was found by the side of the track?

A. Mr. Creamer, Jack Woods and Bob Hughes; there were several came in at the same time; there was four of us started together.

Q. How did you first come to know of the accident?

A. There was one of the trainmen came over and told us there was a man hurt.

By Mr. ISRAEL:

Q. What was that?

A. One of the trainmen came over and he asked if there was an officer there, and said that there was a man hurt at the train.

Mr. STONE, resuming:

Q. Did you notice one of the trainmen with a lantern that night?

A. Yes, sir.

Q. Where was he when you first noticed him?

A. He came right by the side of the cars and then he came right straight across to where we were sitting.

Q. Did you see him get off from the caboose when the train stopped?

A. No, sir.

Q. That will do.

99 By Mr. ISRAEL:

Q. When you speak of being able to see the train at the tank, do you mean with the box cars there on the side track?

A. No, sir.

Q. How close were the box cars to the lumber?

A. Pretty close.

Q. Now, I will ask if, standing on the north side track, as indicated on the north side of the main track, standing in the track between the rails, you could see a train beyond the tank-house if it was half a mile; wouldn't the tank-house obstruct the view?

A. Yes, sir.

Q. Now, as to the height of those lumber piles on the 24th of June; how high were they as compared with your height?

A. A good deal higher.

Q. Higher than your head?

A. Yes, sir; higher than I could reach.

Q. Do you know where the crossing whistling post is?

A. Yes, sir.

Q. Did you hear any whistle blown there?

A. No, sir.

Q. Did you hear any bell rung?

A. Yes, sir.

Q. When was it?

A. After they started up after they stopped.

Q. Is that the first time the bell was rung?

A. That's the first time I heard the bell from that train.

100 By Mr. ALEXANDER:

Q. Now, Mr. Cummings, I want you to tell the jury here, if a locomotive is standing at the tank, say taking in water, with a head-light brightly burning, and you came on the north side of the track, and you say there is three box cars there about 60 or 75 feet beyond that corner, as you say there was that night, I want you to say if you couldn't see the locomotive at that angle—whether you couldn't see that head-light?

A. With the box cars on that track?

Q. Yes.

A. I don't believe you could see it.

Q. Did you ever try it?

A. No, sir.

Q. You never tried it?

A. No, sir.

Q. Did you know a head-light throws an expanding light on the track?

A. I do.

Q. Don't you know if you were standing in the middle of the track (side track) you are looking at an angle?

A. You see that side track is further north.

Q. Then it is an angle?

A. Yes, sir.

Mr. CAMPBELL: Angle with what?

Mr. ALEXANDER: With the main track; I think the witness understands it.

A. Until it strikes the main track again.

101 Q. Don't that there plat show it stands at an angle?

A. I don't think you can stand on the side track with three box cars east of you and see a head-light at the tank.

Q. Now, suppose you step into that space between the north side track and the main track, could you then see it?

A. I think I could.

Q. Do you know what the distance is between the rails between the north side track and the main track?

A. No, sir; I don't know the distance.

Q. About how much; about how many steps? You have crossed there often, you say?

A. Well, it is about—I guess—six or seven feet.

Q. Then in crossing between the north side track this open space between that and the main track of six or seven feet you could see the head-light at the tank, couldn't you—across that open space?

A. Yes, after you passed them box cars you could see.

Q. Now in regard to the height of those lumber piles; you say there was some lumber piled there so high you couldn't reach it; how many of those?

A. I don't remember.

Q. Was there twenty?

A. I don't think there was that many that high.

Q. Was there ten?

A. There might have been.

102 Q. Those piles of lumber you couldn't reach with the top of your hand, how close together were they?

A. The lumber was piled close together all the way up.

Q. Those particularly high piles?

A. I don't remember.

Q. Whatever space they covered—these piles you couldn't reach with your hand—are they the only piles that obscured the train?

A. No, sir; there were high piles further up.

Q. How much space did these particular high piles cover; did they cover a hundred feet?

A. I couldn't say exactly what they did cover.

Q. Well, would they cover 200 feet?

A. The lumber yard is a good, long lumber yard.

Q. Well, the low lumber piles didn't obscure the track, the head-light of a locomotive?

A. There is places where they didn't.

Q. The low piles. How low?
A. Oh, there was some of them as high as your head and some higher.
Q. How high is the head-light of a locomotive?
A. I don't know.
Q. About as high as your head, isn't it?
A. I guess it is higher.
Q. I want to know how many of these piles were as high as that head-light, and about how many feet they went over?
A. Well, a man on the ground——
Q. I am talking of where you sat that night.

Mr. ISRAEL: Let him make that explanation.
103 Mr. ALEXANDER: I am willing.

A. A man standing on the ground it is some distance; there was at least 200 feet that would have been obscured by this lumber.
Q. At least 200 feet that would have been obscured by this lumber to a man standing on the ground?
A. Yes, sir; that is about it.
Q. That is about it. That is all, Mr. Cummings.

H. B. RICHMOND, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Mr. Richmond, where do you reside?
A. I reside at present at the Reward mine, south of Casa Grande.
Q. Where were you on the 24th of June, 1891?
A. Casa Grande.
Q. At what point in Casa Grande were you about eight o'clock that evening?
A. Sitting in front of Mr. Tomlinson's store.
Q. Do you remember the circumstance of a train coming in about that time?
A. Yes, sir.
Q. Where was that train when you first noticed it?
A. Well, the head-light was down the railroad, probably might have been ten or might have been fifteen miles.
104 Q. Did you notice it after it reached the point on the railroad track at the tank-house where they water?
A. Well, when it approaches the tank-house or probably within a mile of the tank-house you can't see it at all.
Q. When can you see it again?
A. After it passes the tank-house.
Q. How much of the time can you see it after it leaves there?
A. It is obstructed again by the Blinn Lumber Company office.
Q. When do you see it again?
A. After it passes there, provided the lumber is not piled too high or freight cars there or something else.

Q. Did you see the train make any attempt to stop?
A. It didn't make any until after the accident.
Q. What signals were given?
A. I heard them blow the whistle the other side of town.
Q. At the mile post?
A. Couldn't say where it was; it was below the tank-house.
Q. Below the tank-house, to the east?
A. Yes, sir.
Q. After they passed the tank was there any bell rung or whistle blown?
A. No, sir; until they stopped
105 Q. About how fast was the train moving after it passed the tank-house?
A. I believe it was about twenty miles an hour.
Q. Did you see the train make any attempt to stop?
A. Yes, sir; after it passed the lumber yard.
Q. Describe the manner.
A. They threw the brakes on so tight it threw fire from the wheels; it showed there was something unusual.
Q. Where was the engine when they commenced to throw the brakes on?
A. Just past the end of the lumber yard.
Q. Looking at this diagram (describes to witness), about how far was it past that corner of the lumber yard was it you saw the fire fly? Between the corner of the lumber yard and this depot, how far from the corner of the lumber yard did you see the fire fly from the wheels?
A. Well, I couldn't say that exactly either; I never measured it; a man might miss it a few feet *feet*; it might be——
Q. About how far would you judge it to be?
A. I couldn't say that either; I say I never measured it and for that reason I don't know.
Q. Which was the engine nearer, the lumber pile or the depot, at the time of checking?
A. It was nearer the lumber pile.
Q. Did you go over there after the checking?
A. After the accident.
Q. How soon after?
106 A. After they made the stop; I went there right away.
Q. What did you see?
A. I saw Mr. Tomlinson lying on the ground; they said he was fatally injured.
Q. How far from the north track?
A. Right close to it; probably half way between the north side track and the main track; I don't remember that either.
Q. Take the witness.

Cross-examination.

By Mr. STONE:

Q. Mr. Richmond, who was sitting with you in front of Mr. Tomlinson's store at the time you mention, before the accident?
A. Johnny Reese.

Q. Can you tell at which whistling post it was you heard the whistle of the train as it came in at that time?

A. No, sir.

Q. Were you paying particular attention to it?

A. I couldn't tell if I had been.

Q. Were you paying particular attention to it?

A. Yes, sir.

Q. What called your particular attention?

A. He was expecting ice in town, and that was the time for the regular train to come in.

Q. How long had you been sitting there before the accident?

A. May have been there an hour; it was quite awhile.

107 Q. About how long was it after you saw the head-light of the approaching train that it came into the yard at Casa Grande?

A. That is hard to say; it might have been a half hour or twenty minutes, or might have been thirty-five minutes; I didn't time it.

Q. At what time did Mr. Tomlinson leave the store there that night, if you know?

Mr. CAMPBELL: Object as not cross-examination.

The COURT: Objection sustained.

Q. Was there anybody else there with you besides Mr. Reese *there* that evening at any time?

A. Yes, sir; Mr. Ferry and Mike Traut were sitting in front of us in chairs; we were sitting on the door-step.

Q. Any one else there?

A. Not that I remember of.

Q. Were you talking about the approaching train?

Mr. CAMPBELL: Object.

The COURT: Objection sustained.

Q. Was the store open or closed at that time?

A. It was closed.

Q. Do you know where the 80-rod whistling post is; or did you ever notice it (examining map)?

Mr. ISRAEL: It is not on there.

Mr. ALEXANDER: Yes, it is on there; the mile-post is on there.

Q. If the bell had rung on the other side of the tank-house would you have heard it probably?

108 A. I don't think I would.

Q. If it had rung on the other side, or easterly side, of the L. W. Blinn Lumber Company's office, do you think you would have heard it?

A. Might possibly have heard it and might not.

Q. So, if it had rung down on the other side of the Blinn Lumber Company's office you might possibly not have heard it?

A. Might not.

Q. Which way was the wind?

A. I don't think there was any wind at all.

Q. A hot, summer evening?
A. Yes, sir; if I remember, there was no wind at all.
Q. Are you familiar with the speed of railroad trains?
A. Well, a little bit, yes.
Q. Can you tell by looking at a railroad train about how fast the train is running?
A. I don't think anybody can except the engineer that runs it.
Q. Then it is a mere guess of yours, saying it was running twenty miles an hour?
A. Yes, sir.
Q. That is all.

A. B. NUTTING, being sworn and examined on the part of the plaintiff, testified as follows:

By M-. ISRAEL: Mr. Nutting, where do you reside?
A. Casa Grande.
109 Q. Where were you on the 24th day of June, 1891?
A. Casa Grande.
Q. Do you remember the circumstance of a train coming in that evening from the east about dark?
A. Yes, sir.
Q. Where were you at the time the train was coming in?
A. On the south side of the track, pretty near opposite Mr. Tomlinson's house—a little above the line between the two lots.
Q. How close to the railroad track?
A. It must have been 75 feet probably.
Q. Where was the train when you were at that point?
A. The train passed me at that point; I came out from where I had been and I saw the train coming down; the first I saw of it particularly it was about half a train-length above the water tank probably.
Q. Did you notice the train from that time on?
A. From that time until it passed me.
Q. Standing how close?
A. Standing about 75 feet, as near as I can recollect.
Q. Did you notice that engine check up?
A. Yes, sir.
Q. About where was it checked?
A. Well, it checked just about as it passed me.
Q. How was it, slowly or suddenly?
A. It seemed to be quite sudden.
110 Q. The train was about opposite you when it checked?
A. Yes, sir.
Q. Now, from the time the train passed the tank-house until it passed you, I want to know if you noticed it all the time?
A. Yes, sir.
Q. Was the head-light burning?
A. Yes, sir.
Q. I will ask you if during the time the train was running from the tank-house down to the depot, if a person had stepped onto the track from the south side would you have seen them?
A. There was no one stepped from the side I was on.

Q. If any had would you have seen them?
A. Yes, sir; couldn't have done otherwise.
Q. Now, I will ask you, after it left the tank-house what signals were given?
A. None whatever.
Q. What speed was that train running?
A. Not running less than eighteen miles an hour; I wouldn't say positive.

Cross-examination.

By Mr. ALEXANDER:

Q. How long have you lived at Casa Grande?
A. Since the 5th of January, 1881.
Q. Where did you approach from as you approached the track?
A. I came out from John Loss's corner.
111 Q. As you came out from John Loss's corner did you see the train coming?
A. Yes, sir.
Q. Where was it then?
A. About half a train-length above the water tank, I guess, or the gardens above the tank.
Q. How far was it from John Loss's corner to the track?
A. It is supposed to be 100 feet from the line to his place, and the gardens is off probably 50 feet, making 150 feet probably.
Q. How far from the train were you standing?
A. I was moving along, slowly perhaps, waiting for the train to pass; I wasn't standing perfectly still; while I was at or near that point, within a few feet, the train passed me.
Q. During the time you walked about 75 or 80 feet from Loss's garden towards the track the train came from a little above the tank and passed you?
A. Yes, sir.
Q. That is correct, is it?
A. That is pretty near correct.
Q. Please look on this map and tell me where Loss's house is as represented on this map.
A. There where it is marked there—"Loss's house."
Q. Did you go directly straight to the track?
A. No, sir; when the train passed me I was probably about here (pointing on map).

By the COURT:

Q. You weren't going towards the station?
112 A. No, sir.

Mr. ALEXANDER, resuming:

Q. You were going angling up this way?
A. Yes, sir.
Q. And you stopped about here?
A. Yes, sir.

Q. And there was the place where the train passed you?
A. Yes, sir.
Q. And while you were standing there and the train passed you, you saw no man coming from the south side?
A. No, sir.
Q. Did you see any man coming from the north side?
A. No, sir.
Q. If the train had struck a man say here, 75 feet east of the corner of the lumber pile, could you have seen it?
A. Seventy-five feet east of the corner of the lumber yard?
Q. Yes.
A. That would be about here, three-quarters of an inch. Under some circumstances I could; under others I could not.
Q. Wouldn't the locomotive have obscured the sight?
A. It would have past the rays of light but not between me and the light.

Q. How long were you there?
113 A. As soon as the train stopped I went around the back end of the train.
Q. Where was it?
A. When I was here the train stopped, with the caboose right opposite me; I went around the caboose.
Q. What you mean to say, then, Mr. Nutting, is while you were standing there and the train passed you, you didn't see any man go on the track from the south side?
A. I didn't see any man go on from the south side at all, and no man could have gone on the track from the south side without my seeing him.
Q. Why?
A. The locomotive was coming along—a bright head-light.
Q. You were looking west?
A. I was looking west.
Q. Could you see a man east of you?
A. I will correct that, I was looking east.
Q. Couldn't a man have come on from the west on the south side? Isn't it possible a person might have stepped on there without you seeing him?
A. Well, it would have been a hard matter for any one to have stepped on there without my seeing him.
Q. Supposing a man had been sitting down on the track?
A. I might have seen him and might not.

Q. Supposing a man had been lying on the track?
114 A. Couldn't tell; might have and might not; couldn't tell as to that.
Q. Wouldn't you have seen a man step onto that track just as quickly from the north side as the south side?
A. No, sir.
Q. Why?
A. Because the rays of the head-light would hide him from my view. If you will let me explain a little about a light?
Q. Yes.

A. In camp fires; I have been out camping a great deal; in camping, when you approach a camp fire you can see everybody between you and the fire and also on the other side until you get out of the light of the camp fire; when you get out of the light you can't see nothing beyond it; you can see beyond it if the light of the camp fire shines on it; if it don't you can't see it.

Q. You say probably if a man went on the south side west of you, you would probably have seen him?

A. I might have seen him.

Q. If he had come from the north side, if he had come within the rays of light you wouldn't have seen him?

A. If he had come within the rays of light, I might have seen him; the rays of light diverge; the reflector is so constructed it is calculated to throw the main body of the rays of light onto the track; at a certain distance ahead of the locomotive the light wouldn't shine on it and in that case you couldn't see them.

115 Q. If there had been four or five men on the north side you wouldn't have seen them?

A. I don't know about that.

Q. Did you see any person anywhere near that track?

A. I didn't see any person anywheres near that track on either side.

Q. On either side?

A. Not that I recollect of.

Q. Did you pay any particular attention that night, Mr. Nutting, as to any signals given by this train?

A. No, sir; there was no signals given after I came out there and stood there until the train passed, and after that I don't know.

Q. After you came out of the house?

A. Yes, sir; and until it passed me there was no signals given.

Q. There might have been a signal blown before that?

A. Before that there might have been possibly a whistle blown at the whistling post, maybe, and as I was in Loss's garden I might not have heard it; at the same time, I didn't hear any whistle at all.

Q. Couldn't the same thing have happened at the tank-house?

A. I was out then. The bell don't sound near as far as the whistle does.

Q. You are satisfied there was no bell rung?

A. Not while I was standing there; there was no whistle blown or bell rung after I came out of Loss's garden and was standing there, I am certain.

116 Q. But the whistle might have blown up at what we call this whistling post?

A. That whistling post is a mile away, I believe.

Q. There is two.

A. There is three, I believe.

Q. Might it not have blown up beyond the tank-house?

A. If it was blown at the first whistling post I might have heard it.

Q. Might not the bell been rung at the first?

A. If the wind was quite still you might have heard it; I have

often seen the bell ring—seen it in motion—and heard no noise, because the wind was the wrong way.

By Mr. ISRAEL:

Q. How was the wind that night?
A. It was quiet; no wind at all, hardly.

Mr. W. C. SMITH, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Mr. Smith, where do you reside?
A. Casa Grande.
Q. Where was you on the 24th day of June, 1891?
A. I was here in Florence.
Q. Where were you residing at that time?
A. Casa Grande.

117 Q. How long had you been residing there prior to that time?

A. Eight years, I think.
Q. When had you come to Florence—how long prior to the 24th of June, the day of this accident?
A. Only a few days.
Q. Mr. Smith, will you describe to the jury, looking at this map, what obstructions, if any——

Mr. STONE: Object to that, for the reason if he came up here a few days prior to the 24th of June he cannot tell us.
The COURT: He can tell what permanent obstructions.

Q. What permanent obstructions were on the north side of the track between the depot and tank-house?
A. Lumber piles, offices and warehouses of the Blinn Lumber Company.
Q. Describe them.
A. About fifty or sixty feet long and height fifteen or sixteen feet—like any ordinary lumber-house.
Q. Do you know where the company's house is on the track east of the depot?
A. Yes, sir.
Q. Have you had occasion to be on the company's tracks or right of way at or near the depot?
A. I have.
Q. I will ask you if, standing on the north switch at or near the southwest corner of the lumber pile, a train can be seen to the east of the tank on the main line?

118 A. It can be seen but for a very short distance beyond the tank.

Q. About how far beyond the tank?
A. Perhaps a hundred feet—two hundred.

Q. After you pass that hundred feet can you see the train beyond that, if you stand on the north switch at or near the corner of the lumber pile?

A. No, sir.

Q. How far out from the lumber pile must you stand before you can see a train that distance beyond the tank on the main line?

A. A very few feet in that angle would make a great difference in the angle.

Q. I will ask you if you can see it from one rail of the main track?

A. You can see quite a distance.

Q. What point could you see it beyond a hundred feet?

A. Half way between the north switch and the main line.

Q. Did you ever stand at the point where Mr. Tomlinson's store was and look across the Blinn Lumber Company's office and lumber and the tank-house to the main line?

A. Yes, sir; several times.

Q. How much of the main line can be seen there between the lumber company's office and the tank-house?

A. About fifty or sixty feet space there.

Q. How far would a person have to step into the street before all the track would be obscured from the tank-house down?

119 A. About twenty-five feet.

Q. Is there any place in the space between that and the railroad track where the track could be seen at all?

A. Not after you pass that point. If the court will allow me to draw an imaginary line I could explain.

Q. You may explain.

A. Supposing this railing to be the track, to the north of it is the north switch; then to the north of that is the tank-house, and to the north of that again for some hundred feet is a corral.

By the COURT:

Q. What is the character of the enclosure?

A. Railroad ties set on end, extending to the north over a hundred feet; that obstructs the sight from seeing any head-light as you stand at Tomlinson's store; it is a hundred feet from Tomlinson's corner to the depot; standing at Tomlinson's corner it is almost impossible to see a head-light past that tank, and especially in the month of June, when the foliage is so dense; there is a space fifty or sixty feet that you can see very plainly between the tank and the Blinn Lumber Company's office; after the train passes that office it is next to impossible to see the train until it passes the lumber yard.

Q. Take the witness.

Cross-examination.

By Mr. ALEXANDER:

Q. Have you experimented lately in regard to these sights, Mr. Smith?

120 A. No, sir; I don't think I have; not lately at all; I noticed it before this accident happened and afterwards.

Q. What called your particular attention to it?

A. No one has spoken to me about the case at all, I don't think.

Q. What called your particular attention to these facts?

A. I have lived there so long and noticed the trains come in.

Q. Then if anybody would tell you that he could see a train coming in eight or ten miles off, you wouldn't believe it?

A. That brings it beyond this corral and tank. You can see a train perhaps twenty miles off—to Picacho; you can't see it three or four miles off, when it gets to the range of this corral.

Q. How far is it down to this tank?

A. Not quite a quarter of a mile.

Q. A person standing then at Mr. Tomlinson's store could see a train then perhaps three or four hundred yards off?

A. You cannot see a train when it comes close to Casa Grande until after it passes the tank.

Q. I am taking it that way.

A. You can't see it until after it passes the tank.

Q. Three or four hundred yards off?

A. Just the distance to the tank.

Q. Going around the corner of the lumber pile and looking east, how far can you see a train coming towards Casa Grande?

121 A. When you reach the track or on the street?

Q. I mean after you pass the lumber pile. There is a space, isn't there, between the lumber pile and the north side track?

A. A very short space.

Q. After you pass the lumber pile and get on the north side track, can you see a train approaching?

A. Perhaps a hundred or two hundred yards.

Q. Couldn't you see it at the tank—the head-light burning at night?

A. Yes, sir; providing there is no obstructions; if there is any cars in the way you couldn't see it.

Q. Then, suppose after you cross the north side track and get into the center of the space between the north side track and the main track, then how far could you see a train approaching beyond the tank-house?

A. Oh, I should say a few hundred yards beyond the tank-house.

Q. From this space between the north side track and the main track, couldn't you see further than three hundred yards?

A. Between the tracks you could see further; on the north switch you couldn't see very far.

Q. When you get in the space between the north side track and the main track?

A. You could see a good ways; the angle would be very much different.

Q. A person crossing at night and taking this angle that crosses over near the corner of that lumber pile over here to what is supposed to be Tomlinson's house, which way would they be facing?

122 A. Coming from the lumber-pile corner to Tomlinson's house?

Q. Yes.
A. Would be facing almost due south, a little east.
Q. Their gaze naturally would be to the south and east?
A. Yes, sir; almost about south.
Q. You live on the south side of the track?
A. Yes, sir.
Q. Close to Mr. Tomlinson's?
A. Yes, sir; only one house between us.
Q. In crossing there in the evening if a train was approaching from the east, you would naturally see it—the head-light—burning?

Mr. CAMPBELL: Object.
The COURT: Objection overruled.
Mr. CAMPBELL: Except.

A. I never cross at the point at the lumber pile; I cross at the depot. I must say in my crossing I have always looked for trains, because in passing the depot from the north you cannot see up to the Blinn Lumber Company's office for the lumber, which is piled so high; you have to keep close watch; I always do, particularly at nights.
Q. In crossing here (on diagram), after you would get out into this space, if a train was approaching wouldn't you naturally see it?
A. Yes, sir; the moment you get beyond the north switch you can see a good ways up the track, because the tank stands about four feet off the main track.
123 Q. If the locomotive was coming within 200 feet of you wouldn't you see it?
A. Oh, yes; of course.
Q. In going from your house to your place of business—going to the north—if a train was approaching you from the east with the head-light burning would you naturally see it?
A. Yes, sir; I would naturally see it.
Q. There is no obstructions on the south side of the track at all, is there, between the line of houses and the track?
A. None whatever unless there is some cars left on the south switch.

Mr. C. M. MARSHALL, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Mr. Marshall, where do you reside?
A. Casa Grande.
Q. Where were you residing on the 24th day of June, 1891?
A. Casa Grande.
Q. Where were you about eight o'clock that evening?
A. I was at my house.
Q. Do you remember the circumstance of a train coming in that night?
A. Yes, sir.

124 Q. Did you see that train come in?
A. I did.
Q. Where is your house in relation to the depot?
Mr. ALEXANDER: Suppose you explain it on the map.
A. It is on the south side of the track, between the depot and the tank.
Q. Just pick it out on the map.
A. That is marked my house.
The COURT: The place marked "Marshall."
Q. Whereabouts at your house were you when the train came in?
A. Sitting in front of the house.
Q. Where did you first notice the train?
A. About the tank-house.
Q. About how fast, in your opinion, was it running at that time?
Q. It was running very fast; I don't know how many miles.
Q. What is your opinion as to the rate of speed?
A. I don't know anything about it; it was running unusually fast; that is what attracted my attention.
Q. Did you see it attempt to stop?
A. Yes, sir.
Q. Where was the engine when it attempted to stop?
A. Somewheres close to the depot.
Q. Were you watching it from the time it left the tank-house until it checked?
A. I was.
125 Q. State what, if any, signals were given during the time it was running from the tank-house to the depot, where it was checked?
A. None at all.
Q. Describe the manner of checking.
A. Very sudden.
Q. Did you hear the bell at all?
A. After it passed the depot; after it was checking.
Q. Was that the first time it was rung?
A. The first time I heard it; yes, sir.
Q. Mr. Marshall, how long had you resided in Casa Grande prior to the 24th day of June, 1891?
A. Ten years.
Q. What obstructions to the view, if any, existed on the railroad track on the north side, on the 24th day of June, 1891, between the depot and the tank-house?
A. There is a lumber yard and building used for office and storing—a long shed.
Q. What is the building called at Casa Grande?
A. Called the Blinn Lumber Company's office and building.
Q. Where is that building situated? Indicate it on the map if you can.
A. That is it, right there (pointing on map), on the north side of the track.

Q. Where is the lumber yard situated—or where was it on that night?

A. On the north side, from that point towards the depot.

126 Q. How near the depot?

A. I think about a hundred feet.

Q. Describe that lumber pile as to height and width and how close to the track.

A. It varied from four to six feet from the ends of the piles to the track.

Q. Distant from the track?

A. Yes, sir.

Q. And what was the height of those lumber piles that night?

A. At that time they were a good deal higher than at present; some were eight and ten feet high; some not so high; the distance from the track would depend on the length of the lumber; it varied from twelve to twenty-four feet.

Q. Did you notice the condition of the north side track as to there being any cars on it?

A. My recollection is there was some cars upon it as I came from my house.

Q. Where upon the north track were they standing?

A. Close to the caboose.

Q. And where was the caboose with reference to the lumber pile?

A. Standing a little to the east of the west end of the lumber pile.

Q. Mr. Marshall, did you ever stand upon the corner of the porch of the building known as Mr. Tomlinson's store and look east to see how much of the track could be seen between the tank-house and the Blinn Lumber Company's office?

A. Yes, sir.

127 Q. About how much of the track can you see from that point?

A. I think about a hundred feet.

Q. Did you ever walk out from that point toward the railroad company's track, still looking to the east, to see what portion of the track could be seen?

A. Yes, sir.

Q. How far did you have to go before that point became obscured?

A. Twenty-two feet.

Q. Did you still pass onto the track?

A. Yes, sir.

Q. Is there any point between that point and the north switch that you can see the main track?

A. No point after you leave the twenty-two feet, going direct to the railroad track.

Q. Did you ever stand on the center of the north switch at or near the west end of the lumber pile, to see how far you could see a train beyond the tank-house?

A. Yes, sir.

Q. How far?

A. From where I stood I couldn't tell exactly where it would be;

I could say it would cut the main line a short distance the other side of the tank-house.

Q. Could you see the main line at all beyond that point?

A. No, sir.

Q. The witness is yours.

128 Cross-examination.

By Mr. ALEXANDER:

Q. Mr. Marshall, in going from the north side of the town of Casa Grande from any of those business houses, and going at an angle across the track, when you strike the north side track how far east could you see a head-light of an approaching train?

A. I think you could see it a little beyond the tank, after you get to the south rail of the north side track.

Q. After you get to the south rail of the north side track you could see a little beyond the tank?

A. Yes, sir; right in front of the tank.

Q. When you get to the middle of the space between the north side track and the main track, how far could you see the main track?

A. Just a little further.

Q. How far is it from the corner of this lumber pile to the main track?

A. I think it is thirteen or fourteen feet.

Q. If you should get to the main track and about to step on the main track and look due east, then how far could you see a train approaching?

A. Well, you can see quite a distance after you got there.

Q. About how far?

A. When we see trains coming in we can't tell how far off they are unless we time them and know what speed they are going.

Q. Could you see it a mile or two or three miles?

129 A. Yes, sir; I think so; there is a space you can't see them.

Q. Approaching from the south side—coming from your house—how far can you see a train approaching at night?

A. There is no obstructions after I pass a house sitting east of me; right at my house there is a house that obstructs; after I get out in the main street I can see several miles.

Q. How does that lumber pile at the present time compare with its status on the 24th of June, 1891?

Mr. ISRAEL: Object.

The COURT: Objection overruled.

A. Well, it is not near as high; I don't think there is more than half as much lumber there.

Q. Do you think there is any pile of lumber there ten feet high now?

A. I think there is some over eight.

Q. How many?
A. I couldn't tell.
Q. How many do you think on the 24th of June last?
A. I don't know; there was quite a number; it had been reduced to about what it is now before that and had been filled up.
Q. Did you ever stand on the porch of Mr. Tomlinson's store to see how far you could see trains approaching?
A. Yes, sir.
Q. How far could you see them?
A. I never paid any particular attention.
130 Q. When you would see a train coming from that direction you would know it would be from the east?
A. Sometimes we could see a light and it wouldn't be a train.
Q. In going across the tracks at an angle and a locomotive 200 yards from you, passing this lumber pile would you see it?
A. You say to the west?
Q. Either east or west. Would you see it?

Mr. ISRAEL: Object to that; a hypothetical question.
The COURT: Ask him to state what the fact is.

A. What is the question?
Q. Going from the north side of the track can you cross through that lumber pile any place?
A. Sometimes you can and other times you cannot.
Q. Is it usual for people to cross through that lumber pile?
A. No, sir; they generally cross at the west end and other places.
Q. You cross at the west end of the lumber pile usually, don't you?
A. Yes, sir.
Q. After you pass the lumber pile and get onto the side track, if a locomotive was coming from either direction with the headlight burning, 200 yards distant, would you see it?
A. If there was no other obstruction.
131 Q. You could see it?
A. Not 200 yards.
Q. No lumber on the side track?
A. No, sir.
Q. Could you see it 200 feet?
A. I could if there were no cars there.
Q. Do you know how long it would take a car to run 200 feet if it was running twenty miles an hour?
A. I do not.
Q. Do you think you as a man that has crossed there could cross safely if the train was within 200 feet, running 20 miles an hour?

Mr. ISRAEL: Object; not material to this case.
The COURT: I think the jury knows just as well as the witness does.
Mr. ALEXANDER: I think so myself.

Q. How long have you lived at Casa Grande?
A. Eleven years.

Q. What was the population on the 24th day of June, 1891?
A. Probably three or four or five hundred people there.
Q. Have you seen a great many people at half past eight o'clock in the evening about the Blinn lumber yard and between that place and the depot, at any time?
A. Yes, sir; frequently.
Q. On this time, the 24th of June, how many people did you see?
132 A. I was at home; didn't see anybody at the track; didn't see anybody.
Q. How many people did you see when you went over there?

Mr. ISRAEL: Object; he didn't say he went over there.
The COURT: Too remote.
Mr. ISRAEL: I withdraw the objection.
The COURT: It takes up time.

Q. Now, Mr. Marshall, those box cars that you think you saw, are you satisfied in your own mind that you did see them?
A. Yes, sir; I came from my house up to that place after the accident; my recollection is that I saw some box cars, that I came between them and the caboose.
Q. When was your attention first called to those cars?
A. My attention wasn't called to them; Mr. Elliott and I walked up there; I started to go around; he remarked, "There is the caboose up there."
Q. Do you remember stating, when you were a witness formerly, that there was no obstructions on that track or near that track except this Blinn lumber yard and the office and buildings?
A. No, sir; I remember being asked if there was any box cars or obstructions on the south side and I said there was not.
Q. Don't you remember testifying that they were all the obstructions?
A. No, sir; I don't remember being asked.
Q. Where was the box cars standing?
133 A. Just east of the end of the lumber yard.
Q. Just mark about where it was standing.
A. This is my house (on map); I walked straight across from my house and left the box cars to the right—caboose on the left.
Q. How many?
A. I noticed one; I passed the end of one car.
Q. One is all you noticed?
A. That is all; there might have been more.
Q. You are just as certain that there was a box car standing on the north side track, are you, as you are of anything you have testified to here to-day?
A. I think I am.
Q. Just as certain as anything else you have testified here to-day?
A. I believe I saw them as plainly as anything else.
Q. Don't want any belief.
A. I am testifying to what I saw.

Q. Are you as certain of seeing those box cars as you are of any other fact?

Mr. CAMPBELL: Object to it as incompetent, asking the witness to pass upon the weight of his own testimony.

The COURT: I don't know how a man would answer such a question.

Mr. ALEXANDER: I don't care to press it.

By Mr. ISRAEL:

Q. Mr. Marshall, where is Casa Grande?

A. It is in Pinal county, Arizona Territory.

134 Mrs. BERTHA TOMLINSON, being sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. ISRAEL:

Q. Mrs. Tomlinson, are you the Bertha Tomlinson named in this action, of Bertha Tomlinson against The Southern Pacific Railroad Company?

A. Yes, sir.

Q. You knew Thomas Tomlinson in his lifetime?

A. Yes, sir.

Q. What relation did he bear to you?

A. My husband.

Q. When did he die?

A. The 24th of June, 1891.

Q. What was his age at the time of his death?

A. Forty-one years.

Q. Are there living any children the issue of your marriage with Mr. Tomlinson?

A. Yes, sir.

Q. What are their names and ages?

A. Alice, aged nine years; Fenton, aged seven years; Howard, aged five years; and Baby, seven months.

Q. Did Thomas Tomlinson leave any surviving parents?

A. Yes, sir.

Q. What were their names?

A. Fenton and Mary.

135 Q. Fenton Tomlinson and Mary Tomlinson?

A. Yes, sir.

Q. What was Mr. Tomlinson's avocation during his lifetime?

A. Merchant.

The COURT: His vocation, I suppose you mean?

Mr. ISRAEL: Yes, sir.

Q. What was your usual, ordinary expenses of maintaining your household at the time of his death?

A. I couldn't say; only guess; perhaps a thousand dollars a year.

Q. What was his manner of supporting his family?

Mr. ALEXANDER: Object.

(Question not pressed.)

Q. What was Mr. Tomlinson's general health at the time of his death?

A. Good health.

Q. What do you say his age was?

A. Forty-one years.

Q. What is your age?

A. Thirty-three.

Q. Take the witness.

(Not cross-examined.)

Mr. ISRAEL: We have some tables we would like to offer—the Carlyle Life Tables.

136 The COURT: Those can be used at any time during the progress of the trial.

Mr. ISRAEL: The plaintiff will rest.

Mr. ALEXANDER: I have an application or motion to make that I don't think it is proper or right for the jury to hear.

The COURT: What is it; a motion with reference to the evidence?

Mr. ALEXANDER: It is a motion to instruct the jury.

The COURT: Do you desire to argue it?

Mr. ALEXANDER: Yes, I would like to present a few authorities on the question.

(Jury excused for twenty minutes and duly admonished by the court.)

Instruction asked by defendant at close of plaintiff's evidence, requested on the ground that the evidence shows conclusively that plaintiff's intestate (Tomlinson) was grossly negligent in attempting to cross the track with an approaching train in full view.

Instruction.

The evidence in this case shows that Thomas Tomlinson plaintiff's intestate, who was killed by the train, did not use ordinary care in crossing the railroad track of defendant, and under the law is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant.

Instruction refused by the court, to which ruling defendant excepted.

137 Jury returned into court and case proceeded as follows:

A. T. COLTON, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. STONE:

Q. What is your name?

A. Albert T. Colton.

Q. What is your occupation?
A. Civil engineer.
Q. Do you occupy any official position in this county?
A. County surveyor.
Q. Look at this plat; do you recognize that (same plat heretofore referred to)?
A. Yes, sir.
Q. As what?
A. Plat of the railroad through Casa Grande, showing the blocks and streets.
Q. By whom was that made, if you know?
A. Myself.
Q. Well, in accordance with what, if anything?
A. In accordance with a survey; part of it was a survey of the town site of Casa Grande, and measurements along the track made by myself.
Q. The survey of which that plat is a representation was made by yourself, did you say?
A. Yes, sir.

Q. Will you point out to the jury on that map and describe
138 to them the points that are indicated on there in distances? Now, beginning with the distance across the track, following along the line of the track, give the distances so they will intelligently understand it.
A. The distance from the corner of the depot to the crossing——

By the COURT:

Q. Are all those things indicated on here by figures, lines, etc.?
A. Yes, sir.

Mr. STONE, resuming:

Q. What have you indicated here as to the lumber piles?
A. The lines here indicate the lumber piles.
Q. How long a distance is the space occupied by the lumber piles?
A. Three hundred and ninety-three feet.

By Mr. ISRAEL:

Q. Is that all marked on there?
A. Yes, sir.
Q. To a scale?
A. Yes, sir.

Mr. ISRAEL: I can't see the competency.

Mr. STONE, resuming:

Q. What is the distance from the lumber piles to the north track, marked "house track"?
A. Eight feet.
Q. Will you explain to the jury what this dotted line is across here directly from the store of Mr. Tomlinson to the track?

139 A. Where the line of sight would strike, missing the lumber office, down to the railroad track near the tank.

Q. The line of sight?
A. Yes, sir.
Q. What portion of that track is visible on that line of sight?
A. It is visible from where this line strikes the track to the tank.
Q. What length? It is not marked there.
A. It is not marked there.
Q. Will you apply a scale and ascertain how much of the track is visible from that store platform?
A. (Witness scales.) About 150 feet, very near it.
Q. Is that line the line of vision along level ground?
A. Yes, sir.

Mr. CAMPBELL: Object as leading.
The COURT: Yes, don't lead the witness, Mr. Stone.

Q. What, if anything, obstructs the track along the portion west of where that line of sight or vision touches it?
A. The lumber yard and piles of lumber and Blinn Lumber Company's office.
Q. What is this red line that you have indicated here?
A. Simply showing distances from different dotted places.
140 Q. Have you any line there indicating the railroad right of way?
A. No, sir.
Q. What is the width of the railroad right of way?

Mr. ISRAEL: Object.

A. One hundred feet each side of the centre of the main track.
Q. What is the scale on which that map is drawn?
A. Fifty feet to the inch.
Q. These names that we see indicated on this map indicate what?
A. Owners of residences or lots.
Q. The names we see on the north side?
A. Indicate the building and what used for.
Q. In what direction does that railroad run?
A. South 54 degrees east and north 54 degrees west.
Q. What is the grade running east?
A. I have only run the grade up to the culvert; it is 1.4 from the depot to the tank, and four feet from the tank to the culvert.
Q. What is the distance from the tank to the culvert, about?
A. About 1,300 feet.
Q. Will you indicate on that map a point eighty rods east of the east end of the depot, or have you a point indicated there showing that?
A. It would be about the water tank; a little past the tank.
141 Q. These measurements are from what point?
A. The black figures are from the town line; the red figures are distances from the center of the crossing to the whistling post.
Q. Is that the eighty rods from the depot?
A. Half a mile from the depot to the whistling post.

By the COURT:

Q. From the arrow points on the red line?
A. Yes, sir.

Mr. STONE, resuming:

Q. The distance from that crossing to a point eighty rods of there would reach what point?
A. To the tank; it is 1,275 feet, I think, somewheres along there, from the tank to the depot.
Q. And one hundred and sixty rods to the whistling post?
A. One hundred and sixty rods to the whistling post.
Q. Take the witness.

Cross-examination.

By Mr. CAMPBELL:

Q. What is the distance from this place marked house and lot—marked "Tomlinson"—to the railroad track?
A. One hundred and forty feet.
Q. Did you measure the distance from the point marked "Tomlinson's house" to the point marked "Tomlinson's store"?
142&143 A. No, sir; I marked the distance on by scale; I made a survey on both sides of the track and the track.
Q. Marked 410 feet?
A. Yes, and 205 feet from the store to the center of the track—on the line from the store to the residence.
Q. And this 123 feet is what?
A. From the east end of the depot platform to the west end of the lumber pile.
Q. What point here do you say is the eighty rods?
A. It would come a little past the tank; between the two points there.
Q. Nearer which of those points?
A. It would be about here.
Q. When did you make those measurements on which that diagram is based?
A. I made part of them last fall when I made the survey of the south half of Casa Grande town site; I forget the date; and the other a few days ago.
Q. What part of last fall?
A. I have forgotten the date; November, I think.
Q. That is all.

Mr. STONE: I will offer that plat in evidence, and ask to have it marked as an exhibit.
Designated by the reporter as Defendant's Exhibit "A."

(Here follows map marked p. 144.)

145 Mr. HENRY BUEHMAN, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. STONE:

Q. What is your name?
A. Henry Buehman.
Q. Where do you reside?
A. Tucson.
Q. What is your occupation?
A. Photographer.
Q. Will you look at that view (handing witness a photograph)? What is it?

Mr. ISRAEL: Do you desire to offer it?
Mr. STONE: Yes, sir.

By Mr. ISRAEL:

Q. When was it made?
A. Week ago last Sunday.

Mr. ISRAEL: Object to it.
The COURT: What is the ground of the objection?
Mr. ISRAEL: It purports to be a photograph of these premises, and it has already been shown not to be now as it was then; it is incompetent.
The COURT: Any other objection to it?
Mr. ISRAEL: Yes, sir; object as irrelevant, immaterial, incompetent and inadmissable; not the best evidence; not evidence of any fact, physical or otherwise.

146 The COURT: Objection sustained for the present; not sufficient foundation laid.

Q. Mr. Buehman, from what place was that view taken?

By the COURT:

Q. What experience have you had in photography?
A. I have worked in the business twenty-five years.

Mr. STONE, resuming:

Q. From what point was that view taken?
A. It was taken directly in front of the store formerly occupied by Mr. Tomlinson.
Q. Will you indicate on that plat there the point from which that is a view?
A. It was taken right from here, on the edge of the sidewalk; right directly in front of his store.
Q. And looking in what direction from that?
A. Looking south—across.

Mr. STONE: We now offer it in evidence, if the court please.

By the COURT:

Q. How far from the point where the instrument was placed is the lowest point there in the photograph in the foreground?
A. It would be about twenty feet, I should judge.
Q. Then the view is really from a point twenty feet south from the edge of the sidewalk in front of Tomlinson's store?
A. Yes, sir; it was taken with a wide-angle lens.

The COURT: Any questions you desire to ask?

147 By Mr. ISRAEL:

Q. What angle was the lens that took this picture?
A. I do not know just the angle; it is a wide-angle lens.

By the COURT:

Q. Have you been constantly engaged in photography for twenty-five years?
A. Yes, sir.

By Mr. ISRAEL:

Q. Designate on the foreground here about where your camera was sitting twenty feet to the north.
A. You can't do that.
Q. Whereabouts did the camera sit?
A. About here; it is like a picture, it is different from where a person may look at it.
Q. Deceptive in that particular?
A. Yes, sir.

By the COURT:

Q. What distortion does that sort of a camera produce, if any?
A. Very little.

By Mr. ISRAEL:

Q. Where was your camera stationed that took this picture?
A. On the edge of the sidewalk in front of the door of Mr. Tomlinson's store.
Q. How far from the corner?
A. I think it is about 15 feet.
148 Q. To the west?
A. Yes, sir.
Q. What was the height of the camera from the ground?
A. I placed it about five feet.
Q. On the sidewalk or on the street?
A. On the sidewalk; it was right on the edge of the sidewalk where the instrument was standing.

Mr. ISRAEL: We shall object to the introduction of this picture for the reason that it does not appear that the height of the lumber

piles was the same as it was the time of the alleged accident—same amount and size.

Objection overruled. Exception.

Photograph marked by reporter "Defendant's Exhibit 'B.'"

(Here follows photograph marked p. 149.)

150 & 151 By Mr. STONE:

Q. Do you recognize or are you acquainted with the objects that are represented in that picture (Exhibit "B")? If so, point them out to the jury.

A. This here on this end is a water tank; that is the Blinn Lumber Company's office; that building there I don't know who occupies that, and the farthest on this end here is where Tomlinson used to live.

Q. Indicate on the plat here the objects mentioned in this picture.

The COURT: Let him make them on the photograph and the jury can make the comparison.

(Exhibit "B" handed to jury.)

Q. Mr. Buehman, will you look at that (another photograph); what is that, if you know?

A. It is a photograph of the railroad tracks, part of the depot, water tank and private residences.

Q. From what point was that taken—at what point was your camera stationed in that picture?

A. My camera was stationed on the center of the main track, 108 feet west of the east corner of the railroad building.

Q. What point east of your camera is represented in that picture; how far on the ground?

A. Well, as far as you can see back there.

By the COURT:

Q. No; he means how far would the first point in the picture be from where your camera was?

A. About fifteen feet.

152 Mr. STONE: I will offer that in evidence.

By Mr. CAMPBELL:

Q. Was that picture taken the same time this (Exhibit "B")?

A. Taken a week ago Sunday.

(Reporter marks "Defendant's Exhibit 'C.'")

(Here follows photograph marked p. 153.)

154 & 155 By Mr. STONE:

Q. From what point was that picture taken (another photograph)?

A. It was taken from a point 134 feet east of the east corner of the railroad building and twenty-two feet north from the center of the main track.

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piles was the same as it was the time of the alleged accident—same amount and size.

Objection overruled. Exception.

Photograph marked by reporter "Defendant's Exhibit 'B.'"

(Here follows photograph marked p. 149.)

150 & 151 By Mr. STONE:

Q. Do you recognize or are you acquainted with the objects that are represented in that picture (Exhibit "B")? If so, point them out to the jury.

A. This here on this end is a water tank; that is the Blinn Lumber Company's office; that building there I don't know who occupies that, and the farthest on this end here is where Tomlinson used to live.

Q. Indicate on the plat here the objects mentioned in this picture.

The COURT: Let him make them on the photograph and the jury can make the comparison.

(Exhibit "B" handed to jury.)

Q. Mr. Buchman, will you look at that (another photograph); what is that, if you know?

A. It is a photograph of the railroad tracks, part of the depot, water tank and private residences.

Q. From what point was that taken—at what point was your camera stationed in that picture?

A. My camera was stationed on the center of the main track, 108 feet west of the east corner of the railroad building.

Q. What point east of your camera is represented in that picture; how far on the ground?

A. Well, as far as you can see back there.

By the COURT:

Q. No; he means how far would the first point in the picture be from where your camera was?

A. About fifteen feet.

152 Mr. STONE: I will offer that in evidence.

By Mr. CAMPBELL:

Q. Was that picture taken the same time this (Exhibit "B")?

A. Taken a week ago Sunday.

(Reporter marks "Defendant's Exhibit 'C.'")

(Here follows photograph marked p. 153.)

154 & 155 By Mr. STONE:

Q. From what point was that picture taken (another photograph)?

A. It was taken from a point 134 feet east of the east corner of the railroad building and twenty-two feet north from the center of the main track.

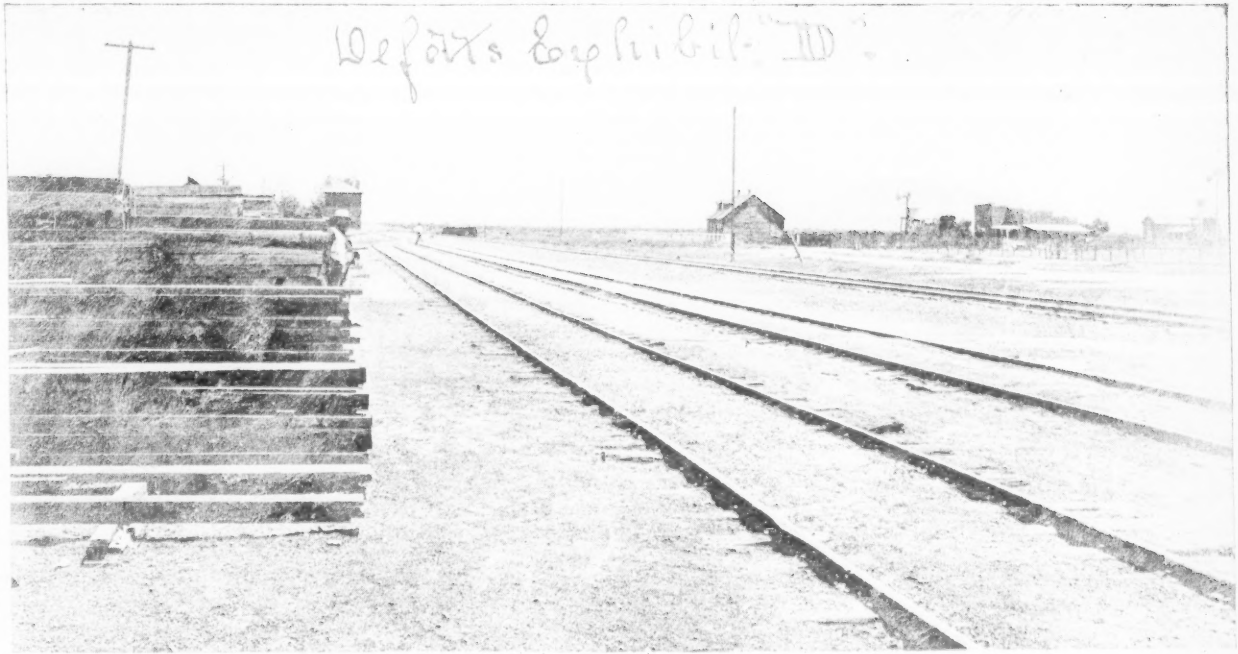
No. 967.
So. Pac. Co. et al
vs
Tomlinson

Defts Exhibit "B".

[Endorsed] Filed " Jun. 7th. 1892. BURTON J. HAWLEY, Clerk."

[Endorsed] Filed June 7th, 1892. Burton J. Hawley, Clerk.

Defts Exhibit "D"



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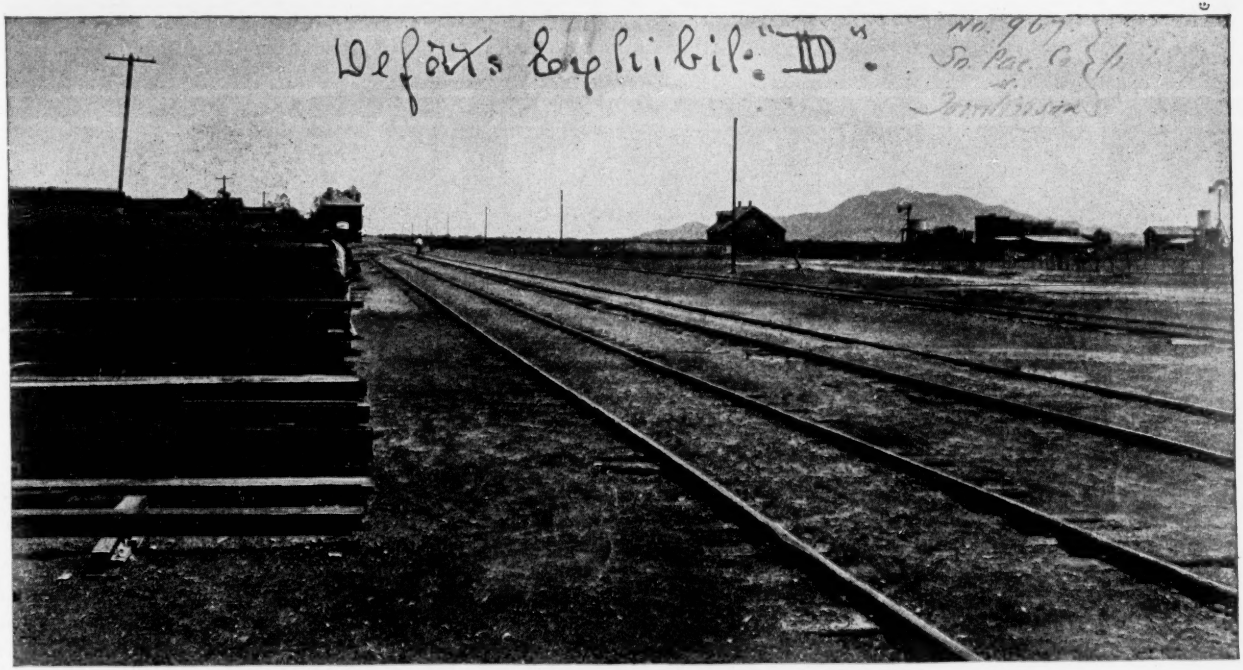

[Endorsed] Filed "Jun. 7th, 1892. BURTON J. HAWLEY, Clerk."

Q. Looking——
A. Looking east.
Q. At what point was your camera stationed—at that point, or is that the point on the ground?
A. It was stationed 134 feet east.
Q. And how far east of the depot building is shown on that first? How many feet east of that point would be the first point shown in that picture?
A. Not more than ten feet—hardly that.
Q. The first ground you see in that picture would be how many feet from the depot building?
A. One hundred and forty or one hundred and forty-two feet. About twenty-two feet from the track.

By Mr. ISRAEL:

Q. Did you make that measurement yourself?
A. I stepped it off.
Q. How many paces?
A. A little over seven paces.
Q. Long strides or ordinary?
A. No, I am very good at stepping.
Q. Whereabouts in this north of the track did the instrument set?
A. In the center of the main track.
156 Q. The instrument sat?
A. No, sir; from where I measured; the instrument was about twenty-two feet north of the main track.
Q. How many paces?
A. Seven paces or a little over.

Mr. STONE: I will offer this in evidence.
Marked by reporter "Defendant's Exhibit 'D.'"

(Here follows photograph marked p. 157.)

158 & 159 By Mr. STONE:

Q. Was this picture (another one) taken at the same time, Mr. Buehman?
A. Yes, sir.
Q. At what point was your camera sitting when you took that picture?
A. It was south of the railroad building, on the other side of the street.
Q. On which side from the railroad building?
A. South.
Q. Will you indicate on this plat about the point where your camera was placed when that picture was taken?

By the COURT:

Q. Do you know where Mr. Smith's house is?
A. Yes, sir.

Q. What direction was it from that you had your camera?
A. It was right here (pointing on map).

By Mr. ISRAEL:

Q. How near the fence?
A. Fifteen feet of the fence.
Q. To the corner of Smith's and Loss's lot?
A. Yes, sir.

By Mr. STONE:

Q. And in what direction looking?
A. Looking east.
Q. And what portion of this plat is taken in in that view?
A. Taken the whole row of buildings, showing the front.
160 Q. I see a figure on there of a child; tell the jury where the child was standing.
A. Right in front of Mr. Tomlinson's house; right in front of the gate.
Mr. STONE: I offer this in evidence.
Marked by reporter as "Defendant's Exhibit 'E'."

(Here follows photograph marked p. 161.)

162 & 163 Q. Take the witness.

(Not cross-examined.)

Mrs. MARY E. WOODS, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. ALEXANDER:

Q. What is your full name, Mrs. Woods?
A. Mary E. Woods.
Q. Where do you reside?
A. Casa Grande.
Q. Where did you reside on the 24th day of June, 1891?
A. Casa Grande.
Q. How long have you lived at Casa Grande?
A. About eight years.
Q. Do you remember any incident or accident that happened on the 24th day of last June at Casa Grande?
A. Yes, sir; I do.
Q. At what time of the day or night was it?
A. About half past eight in the evening.
Q. Do you remember of a train coming into Casa Grande that night?
A. Yes, sir.

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Q. What direction was it from that you had your camera?
A. It was right here (pointing on map).

By Mr. ISRAEL:

Q. How near the fence?
A. Fifteen feet of the fence.
Q. To the corner of Smith's and Loss's lot?
A. Yes, sir.

By Mr. STONE:

Q. And in what direction looking?
A. Looking east.
Q. And what portion of this plat is taken in in that view?
A. Taken the whole row of buildings, showing the front.
160 Q. I see a figure on there of a child; is it the jury where the child was standing.
A. Right in front of Mr. Tomlinson's house; right in front of the gate.
Mr. STONE: I offer this in evidence.
Marked by reporter as "Defendant's Exhibit 'E.'"

(Here follows photograph marked pc 161.)

162 & 163 Q. Take the witness.

(Not cross-examined.)

Mrs. MARY E. WOODS, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. ALEXANDER:

Q. What is your full name, Mrs. Woods?
A. Mary E. Woods.
Q. Where do you reside?
A. Casa Grande.
Q. Where did you reside on the 24th day of June, 1901?
A. Casa Grande.
Q. How long have you lived at Casa Grande?
A. About eight years.
Q. Do you remember any incident or accident that happened on the 24th day of last June at Casa Grande?
A. Yes, sir; I do.
Q. At what time of the day or night was it?
A. About half past eight in the evening.
Q. Do you remember of a train coming into Casa Grande that night?
A. Yes, sir.

Defts Exhibit "H".

[Endorsed] Filed "Jun. 7th, 1892. Burton J. Hawley, Clerk."

Q. Did you hear or notice the blowing of the whistle or ringing of the bell as it approached Casa Grande that night?

164 A. I didn't notice the whistle; I heard the noise of the train, the rumbling; I didn't notice the ringing of the bell until my attention was called to it.

Q. How was your attention called to it and by whom?

Objected to. Sustained.

Q. Was your attention called to the ringing of the bell?

A. Yes, sir.

Mr. CAMPBELL: Object; move to strike out the answer.

The COURT: Objection sustained; stricken out.

Q. Did you hear the ringing of the bell?

A. I did.

Q. About how long after you heard the ringing of the bell did you hear of the accident that occurred?

Mr. CAMPBELL: Object; hearsay.

The COURT: It is to fix the time. Go ahead, I will hear it.

A. Within a short period, perhaps about fifteen minutes; I am not exactly certain; a short period.

Q. Did you after hearing of the accident go to the place where the accident occurred?

A. I went over near the place of the accident.

Q. Please state, Mrs. Woods, in what direction from your house you went to the place of the accident.

A. I went to the crossing and then went a little ways

165 above the crossing around the end of the train; I don't know just exactly how far; several cars I went around.

Q. What did you find at that place?

A. I found a number of people standing around about Mr. Tomlinson.

Q. Was it Mr. Tomlinson that was hurt?

A. It was Mr. Tomlinson that was hurt.

Q. Where was Mr. Tomlinson at the time you first saw him?

A. He was between the end of the lumber pile on the north side of the track—between that and the depot.

Q. In what position was he?

A. There were a number of people around him; I didn't see his position exactly; they were examining his wounds; he was on a cot.

Q. Who was present in your immediate vicinity?

A. Of course, at the cot people were standing around him; in my immediate vicinity was the young girl who went across with me, and a brakeman who was speaking with us about the accident.

Q. Did the train remain at that place while you were standing there?

A. Yes, sir; it did.

Q. Did you see, while you were standing at this place, Mrs. Tomlinson at the place?

A. She came there while I was there.

Q. Did you hear her make any remark or remarks while you were standing there?

Mr. ISRAEL: Object as immaterial and incompetent; all that matter was stricken out at the last trial.

166 Mr. ALEXANDER: I think not; she is the plaintiff in this action.

The COURT: Objection overruled.

Mr. CAMPBELL: Except.

The COURT: Of course I can't know in advance what was said.

A. She was in great distress.

Q. Did you hear her make any remarks while you were standing there?

A. Yes, sir.

Q. Please state what they were.

Mr. ISRAEL: Object.

The COURT: Simply in reference to this matter?

Mr. ALEXANDER: Yes, she is the plaintiff in this action.

A. She said a great many things, but of course she blamed herself very severely for requesting Mr. Tomlinson to go across the track.

Mr. CAMPBELL: Object; move to strike out the answer.

The COURT: Yes; strike it out.

Q. She said, "It is all my fault." If I state what she said, it will be to state how the accident occurred.

By the COURT:

Q. Just what she said; remember her words and repeat them.

A. She says, "I blame myself for it all; I asked Tom to
167 go across the track when we saw the train coming, to get some beer and ice;" and she blamed herself repeatedly. I replied to her and told her that I didn't think she was to blame, because so many people were careless about crossing the track, even in broad daylight; they waited until the train was near and passed across carelessly, when a misstep would throw them across the track; of course there was a great deal said——

Mr. CAMPBELL: Object as incompetent and immaterial; not part of the *res gestæ*.

The COURT: Statements made by Mrs. Woods will be stricken out; that by Mrs. Tomlinson will remain.

Mr. CAMPBELL: Except.

Q. Did you after that remain with Mrs. Tomlinson? Did you see Mrs. Tomlinson during the night?

A. I did; remained with her until after the death of Mr. Tomlinson.

Q. And about what time did the death of Mr. Tomlinson take place, if you recollect?

A. I think about three hours afterwards, nearly.

Q. Did you have occasion to, or did you, notice any wounds upon the body of Mr. Tomlinson?

A. I didn't examine the wounds particularly; I saw that he was wounded in the head; that I knew; of course the other wounds I didn't see.

Q. Now, at the time you heard this ringing of the bell, where were you, in what part of town?

A. I was in the kitchen of my house.

168 Q. Will you look upon this plat here, this map (Exhibit "A"), and show the jury about where you live, this being the depot?

A. I live in this place, marked "Woods' house."

Q. You were then in that house, and in what part of it, when you heard the ringing of the bell?

A. The back portion of the house; the part that lays between the space of my house and the house joining mine.

Q. Was any one with you?

A. Yes, sir.

Q. Who?

A. My little boy, Frank, and the young girl, Mamie Carghill.

Cross-examination.

By Mr. CAMPBELL:

Q. Whereabouts is that house? How far from the depot west?

A. About 140 feet.

Q. What is the character of the house, lumber or adobe?

A. Adobe, with the windows and doors all open; can hear every sound.

Q. What portion of the house were you in fifteen minutes before you heard of the accident?

A. In the kitchen portion of the house; same portion I heard the bell.

Q. What portion of the house was that?

A. Kitchen.

Q. That was the only time you heard the bell, wasn't it?

169 A. I didn't notice it before; might not have noticed it at all if my attention had not been called to it.

Q. What was Mrs. Tomlinson's condition apparently, when you got there and heard this conversation, in reference to hysterics or quiet?

A. Feeling as a person would naturally feel after an accident of that kind; distressed.

Q. Crying?

A. Not sobbing; no, I can't say she was crying.

Q. Excited?

A. I can't say about that.

Q. Feeling nervous?

A. I can't say about that.

Mr. L. L. ENGLISH, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. STONE:

Q. Where do you reside?
A. Casa Grande.
Q. Where were you on the 24th day of June last, of 1891, if you remember?
A. I was up on the track about two miles above Casa Grande, where there is a new hotel built by Mr. Thomas.
Q. Up near what they call Arizola now?
A. Yes, sir; Toltec I believe at present.
170 Q. Where were you about eight o'clock in the evening?
A. Sitting in front of our camp.
Q. Where at?
A. At Toltec.
Q. This brick hotel above Casa Grande?
A. Yes, sir.
Q. Did you notice about that time a freight train coming from the east toward Casa Grande?
A. I did.
Q. How was your attention particularly called to it?

Objected to. Sustained.

Q. Tell the jury what circumstances, if anything, you noticed in regard to that train.
A. I saw the train come in; saw the head-light quite a ways; what called my attention to that was this man McGovern——
Q. Don't tell what was said. Did you hear the bell ring or the whistle blow?
A. Yes, sir.
Q. How many times?
A. Twice.
Q. At what points?
A. It was between me and Casa Grande.
Q. That is all. Take the witness.

Cross-examination.

By Mr. CAMPBELL:

Q. Did the whistle blow east of where you were camping?
171 A. I would call it west.
Q. Did it blow east?
A. I didn't hear it blow east.
Q. How far from the track were you?
A. I should judge it was about one hundred yards.
Q. Where—in a tent?
A. No, sir; out in the open air.

Q. Lying down or standing up?
A. I was sitting down on a lot of barley we had stored there.
Q. Could you see Casa Grande from where you were sitting?
A. No, sir.
Q. How far down the track could you see?
A. Well, sir, it was about dark; a man couldn't see very far after dark.
Q. Did you follow the train with your eyes from the time after it passed you?
A. I naturally would follow it a little ways.
Q. Just in your line of vision?
A. Yes, sir.
Q. Which way were you facing?
A. After it went by I was facing it and facing towards Casa Grande.
Q. Towards the track?
A. Yes, sir; and towards Casa Grande.
Q. And you didn't notice the train after it passed your line of vision?
A. I could see the train some distance down the track by——
172 Q. Were you paying any particular attention?
A. No, sir; only just talking about it.
Q. Anybody with you?
A. Three other parties.
Q. Engaged in conversation?
A. Yes, sir.
Q. That is all.

By Mr. STONE:

Q. Well, in that conversation was anything said about this whistle? You need not tell me what was said.

Mr. CAMPBELL: Object.
The COURT: Objection sustained.

Mr. JOSIAS WILKINSON, being sworn and examined as a witness on the part of the defendant, testified as follows:

By Mr. ALEXANDER:

Q. Where do you reside, Mr. Wilkinson?
A. In Tucson, Arizona.
Q. Where did you reside on the 24th day of June last?
A. In Tucson; that was my home.
Q. What is your occupation now and what was your occupation at that date?
A. Railway conductor.
Q. How long have you been in that employment?
A. Between fourteen and fifteen years.
Q. What were you doing on the 24th day of June, 1891?
173 A. I was in charge of a special stock train west bound, from Tucson to Yuma.

Q. Do you recollect about what time you got to Casa Grande station or yard on that day or night?

A. It was 8.35 p. m., San Francisco time.

Q. Now, Mr. Wilkinson, state what occurred, if anything, in the Casa Grande station yard that night, in as short a manner as possible, to the jury.

A. What occurred in the yard?

Q. Yes, in coming into the yard, until you got through the yard, in regard to this train?

A. Well, when we were some distance out from Casa Grande I heard the whistle blow the station whistle—that is, one long blast of the whistle indicates you are approaching a station—and about that time or immediately afterwards I noticed the train was slowing down and wondered why it was——

Mr. CAMPBELL: Object to any wondering the gentleman indulged in.

The COURT: Go ahead; just state what occurred.

A. The train slowed down to some extent; I heard then the whistle blow for the crossings, just about half way between the whistling post for the station and Casa Grande; shortly afterwards the train stopped. I took my lantern and got down off the caboose and walked down the side of the train and found a man lying on the ground between the main track and the north side track, about half way between the caboose and the engine, injured.

Q. Anything else?

174 A. I sent a man to call an officer or a physician or both; I went to the railroad office and reported the fact that there was some one injured, and I made a telegraphic report to my superintendent; I rendered what assistance I could in the way of making the man comfortable, by giving the ice I had in the caboose——

Mr. CAMPBELL: Object as immaterial.

A. Well, that is part of what I done, and there is nothing more that I think of.

Q. What class of train was that that came into Casa Grande that night?

A. Special stock train.

Q. Mixed freight train?

A. Stock train; all stock.

Q. How many cars were the train made up of?

A. Twenty cars and the caboose.

Q. About what length of space would that train take in feet?

A. About 600 feet.

Q. From the time you noticed the slowing up of the train, about what distance did the train run until it came to a full stop?

A. From the time I noticed it first beginning to slow down until it stopped?

Q. Yes.

A. It was close to a mile, I should think.

Q. At what place, if you can describe it, did you first perceptibly know of the train being slowed down?

A. About the whistling post it began to slow down.

175 Q. And stopped about where? Just show the jury on that map (Defendant's Exhibit "A"), if you can, Mr. Wilkinson, if you can recognize it. The place marked "depot" represents the passenger depot and the place marked "lumber yard" represents the lumber yard alongside of the track.

A. The train stopped right along here; this crossing here was covered by the train; and while I didn't go down to the engine to note exactly where it stood, the body lay twelve car-lengths from the engine and eight car-lengths from the caboose when I found the body; it was eight car-lengths from the caboose and twelve from the engine.

Q. In relation to the lumber yard; about how far east from that, if it was east, did the caboose stand?

A. Well, I couldn't say exactly.

Q. Have you any idea how far from the depot?

A. It must have been something over 300 feet from the depot.

Q. As a railroad man, what, in your opinion, was the rate of speed that the train was running from the time it first commenced slowing down and entering into the Casa Grande yard?

A. Well, it began slowing down at a rate of speed exceeding twenty-five miles an hour, and slowed down to the point where it entered the yard at about twelve miles an hour.

Q. Then after it passed the tank and entered the yard, in your opinion, it was running at a speed of about twelve miles an hour?

A. Yes, sir.

176 Mr. ISRAEL: Object; he hasn't said anything about the tank.

Q. After it entered the yard?

Mr. ISRAEL: Object.

Q. Do you know what the railroad yard is there?

A. Yes, sir.

Q. State what it is.

A. The limits of the yard, allowing the road runs east and west, the limits of the yard would be the east and west switch.

Q. Where is the end of the east switch?

A. A little east of the water tank, I believe.

Q. Then from that switch I understand you to say the train had slowed down to about twelve miles an hour; is that correct?

Objected to. Sustained.

Q. What was the speed from the east switch as it entered the yard and ran through the yard?

A. The train didn't run through the yard.

Q. Until it was stopped?

A. It slowed down from the rate of about twelve miles an hour to a dead stand-still.

Q. How long did the train remain at Casa Grande after it stopped?

A. Somewhere from twenty-eight to forty minutes—thirty-five minutes; after I registered out I didn't go immediately; there were some questions asked; I don't remember exactly what the time was.

177 Cross-examination.

By Mr. CAMPBELL:

Q. What business are you engaged in now?
A. Conducting train on the railroad.
Q. What kind of a train?
A. Freight train.
Q. Where?
A. Between Tucson and El Paso.
Q. What part of the train were you on going into Casa Grande?
A. In the caboose.
Q. Twenty car-lengths from the engine?
A. Yes, sir.
Q. What were you doing at the time you heard the whistle blow?
A. I was writing at my desk.
Q. When did you stop writing?
A. Between the time that the whistle blew first for the station and the time it blew for the crossing; about that time; a minute or so.
Q. What were you doing between that time and the time the train stopped?
A. Well, my time was divided between going up in the cupola and looking out to determine where we were, talking to one of the brakemen, calculating the time with my watch, etc., as a man would naturally do in his every-day duties.
Q. What time did the train leave Tucson?
A. About six o'clock.
Q. What time were you due at Yuma?
178 A. As soon as we could get there with perfect safety.
Q. What is the distance between Tucson and Casa Grande?
A. Sixty-five miles.
Q. What time did you say you got to Casa Grande?
A. 8.35 p. m.
Q. When you got down off the caboose whereabouts did you find the body of Mr. Tomlinson? Designate there on the map, if you can.

The COURT: The scale is fifty feet to the inch.

A. I think it lay in here somewhere; it was close to the end of the lumber pile.
Q. It was close to the end of the lumber pile?
A. Yes, sir; close to it; yes.
Q. That is all.

At this point (11.50 a. m.) court took a recess until 1.50 p. m., and

the jury was duly admonished by the court and excused until that hour.

After recess. All present.

Mr. JOSIAS WILKINSON recalled on the part of the defendant.

By Mr. ALEXANDER:

Q. Mr. Wilkinson, on the night of the 24th of June, the night of the accident, was there any box cars or other sort of cars standing on the north side track at or near your train?

A. At or near the train?

179 Q. Yes, or on the side track at all?

A. There might have been some west of the depot.

Q. Was there any east of the depot?

A. No, sir.

Q. That is all.

By Mr. CAMPBELL:

Q. Did you pay any particular attention to the condition of that north side track at the time you got off?

A. I did, sir; not at the time I got off but afterwards.

Q. That is all.

ANDREW HYSTROM, being sworn and examined as a witness on the part of defendant, testified as follows:

Direct examination.

By Mr. ALEXANDER:

Q. Where do you live, Mr. Hystrom?

A. Tucson.

Q. Where did you reside on the 24th day of June, 1891?

A. Resided at Tucson.

Q. What is your occupation?

A. Brakeman.

Q. What was your occupation on the 24th of June last?

A. A brakeman.

180 Q. On the 24th of June where were you and what were you doing?

A. I was on a special train between Tucson and Yuma.

Q. On approaching Casa Grande station on the night of the 24th day of June last, at that time where were you—on what part of the train?

A. I was sitting in the cupola.

Q. Please explain to the jury what the cupola is and what you mean by "sitting in the cupola"?

A. The cupola is the highest portion of the caboose, where the brakeman sits and watches the train, to see if anything occurs; you

can see the reflection of the head-light and can see the track by putting you head through the window.

Q. On approaching Casa Grande or in the Casa Grande yard did anything particular occur; if so, state.

A. There was nothing particular occurred only after we stopped we walked up along the track and found a man lying there.

Q. You stopped at the station, did you?

A. Yes, sir.

Q. At what time of night was it?

A. At 8.30 I should judge.

Q. Was there the regular signals given by the train that night on approaching Casa Grande?

Mr. CAMPBELL: Object.

The COURT: Objection sustained.

Mr. CAMPBELL: On what ground?

The COURT: Ask him what signals.

181 Q. Exactly. What signals, if any, were given upon approaching the station of Casa Grande that night?

A. The station whistle, mile post, and the crossing whistle.

Q. Both whistles?

A. Yes, sir.

Q. What do you call the crossing post—how far from the station?

A. Supposed to be eighty rods.

Q. How far is the other?

A. A mile.

Q. Did you hear the bell ringing that night?

A. Couldn't say if I heard it or not; didn't pay any attention to it.

Q. On entering the Casa Grande station yard, at about what rate of speed was the train moving that night?

A. We were gradually slowing down until we stopped, from above the whistling post where the air was first applied.

Q. Well, in your opinion, about what rate of speed was the train moving as it got into the yard?

A. When the front end of the train passed the water tank we were going about thirteen or fourteen miles an hour.

Q. When you got into the front end of the yard?

A. After the engine passed the water tank about fourteen or fifteen cars the air was released and we were going fourteen or fifteen miles an hour—perhaps a little slower.

Q. What kind of a train was that?

182 A. Special cattle train.

Q. How many cars?

A. Twenty cars and caboose.

Q. About what length was that train from the front end of the pilot back to the end of the caboose?

A. About 700 feet; maybe a little over.

Q. That is all. You may have the witness, gentlemen.

Cross-examination.

By Mr. CAMPBELL:

Q. In whose employ are you now?
A. Southern Pacific.
Q. In what capacity?
A. Brakeman.
Q. Where?
A. Tucson to El Paso—Tucson division.
Q. How long were you in the cupola?
A. Leaving Red Rock.
Q. Any windows in that cupola?
A. Yes, sir.
Q. Where?
A. Front, sides and back.
Q. All open, or closed?
A. Back and side windows open, front closed?
Q. From the cupola how far can you see?
A. Past the locomotive.
Q. How far past the locomotive?
A. Four or five hundred feet; according to the reflection of the head-light.

183 By Mr. ALEXANDER:

Q. That night did you see any cars standing upon the north side track, in the yard, at or near your caboose or your train?

Mr. ISRAEL: Object to that "Did you see."

The COURT: The question whether he saw or *or* not wouldn't make any difference unless he had opportunities to see.

A. There was no cars on this side of the track on the south or east side of the depot, or whatever direction you call it.

By Mr. CAMPBELL:

Q. When the train stopped at Casa Grande, did you get out of the cupola?
A. I got out of the cupola after he whistled for the crossing.
Q. Did you go out on the ground after the train stopped at any time?
A. Yes, sir; after the train stopped I went out immediately, on the right-hand side of the train; went out the hind door of the caboose; walked up alongside the train and found a man there.
Q. How long did you stay there?
A. Until the officer came, about four or five minutes.
Q. Then where did you go?
A. I stood and looked what they were doing, and looked over the train afterwards.
Q. That is, you walked up towards the depot?
A. Yes, sir; after the train started up.

Q. Where?

184 A. About half way up between where Mr. Tomlinson was lying and the depot.

By Mr. ALEXANDER:

Q. Was the train moving when you got on?

A. Yes, sir.

Mr. Jos. BROWN, being sworn and examined as a witness on the part of the defendant, testified as follows:

By Mr. ALEXANDER:

Q. Where do you reside, Mr. Brown?

A. Tucson.

Q. Where did you reside on the 24th of June last?

A. Tucson.

Q. What is your occupation?

A. Brakeman.

Q. How long have you been employed in railroad business?

A. For the Southern Pacific Company or other companies?

Q. Altogether.

A. About twelve years.

Q. Where were you on the night of the 24th of June, 1891?

A. I was on a west-bound freight train for Yuma.

Q. Do you recollect about the time that night that you entered into the Casa Grande station yard?

A. Yes, sir.

185 Q. About what time was it?

A. About 8.30.

Q. Where were you at that time on the train?

A. Sitting in the cupola.

Q. Sitting in the cupola?

A. Yes, sir; south side.

Q. Do you recollect anything of an accident happening in the Casa Grande railroad yard that night?

A. I didn't see any accident, but I recollect of the circumstance of finding a man there.

Q. Please state to the jury exactly how it happened.

Mr. ISRAEL: He just stated he didn't know any of the circumstances.

The COURT: The finding of the man, I suppose.

A. After we stopped we started to walk down on the south side of the train; about eight cars from the caboose we came to a man lying on the ground——

Q. On the south side or north side?

A. On the north side—excuse me—we found a man lying there; I was sent across to town to bring an officer to take charge of him.

Q. Did you find a man?

A. Found Mr. Cummings and Mr. Creamer sitting at the saloon, and they both came over.

Q. That night on approaching Casa Grande were the whistles blown?

Mr. ISRAEL: Object to the form of the question.

The COURT: On the ground it is leading?

186 Mr. ISRAEL: Yes, sir.

The COURT: It is leading.

Q. On approaching Casa Grande that night what was done, Mr. Brown?

The COURT: In reference to any signals, I suppose you mean?

A. The proper signals were given at the whistling post and crossing——

Mr. CAMPBELL: Move to strike out the answer.

The COURT: It will be.

Q. State what was done.

A. We whistled for the station and along further we whistled for the crossing—gradually slowed down from there in.

Q. From where?

A. From the whistling post.

By the COURT:

Q. What is the character of the signal at the crossing?

A. It is two whistles.

Q. Short or long blasts?

A. One long and one short.

By Mr. ALEXANDER:

Q. And at the mile?

A. One long.

Q. At the time or after you passed the last whistling post, or the crossing post, as you call it, at about what rate of speed was the train running as it went into the yard?

187 A. Up to the east switch about fifteen miles and then slowed down to between ten and twelve.

Q. At about what place in the yard was the train brought to a stop?

A. It was brought to a stop about the lumber yard; the engine was past the depot.

Q. And the caboose? If you can, show on this map here about the part of the yard where the caboose stood. (Map explained to witness by the court.)

A. Well, it stood just about in here (pointing). It stood east of this opening between the lumber yard and the crossing—about eight cars east of there.

Q. How many cars were there in that train?

A. Twenty cars and the caboose.

Q. And how many cars would it leave west of this place you speak of?

A. West of that?

Q. Yes.
A. About twelve.
Q. Did you count the cars yourself?
A. Yes, sir.
Q. Now, if you recollect, Mr. Brown, can you point about the place where you found Mr. Tomlinson, from this plat here?
A. Mr. Tomlinson was lying about in here (pointing on map).
Q. In the space between the lumber yard and the depot?
A. Between the corner of the lumber yard and the place where the wagons pass.
188 Q. How far from the corner of the lumber yard?
A. Probably as close as fifty feet—as close as I could tell you now; I never noticed particularly.
Q. Did you hear the bell ringing that night as the train went into the Casa Grande station?
A. I did; it commenced ringing about the section-house.
Q. It was ringing, was it?
A. Yes, sir.

By the COURT:

Q. Where is the section-house?
A. Just a little east of the tank.

By Mr. ALEXANDER:

Q. About what length was that train, Mr. Brown?
A. Well, the cars we had in it was twenty-eight-foot cars, with about a three-foot opening.

By the COURT:

Q. You are speaking of the opening between the cars?
A. Yes, sir.

By Mr. STONE:

Q. Twenty-eight feet in the clear, inside?
A. Yes, sir; it is what they call a twenty-eight-foot car.

By Mr. ALEXANDER:

Q. Was there any box cars or other cars on the north side track at or near your train that night in the yard?
A. There was some west of the depot.
189 Q. Was there any east of the depot, I mean?
A. No, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. When did you get into the cupola?
A. Leaving Red Rock; get out at every station, every stop they make.

Q. Anybody in there with you?

A. About the whistling post Hystrom got out of the cupola; Mr. Wilkinson got up into the cupola but did not sit down.

Q. How long did you stay in the cupola after Mr. Hystrom got out?

A. I got down just about the water tank.

Q. What part of the train did you remain in after you got out of the cupola?

A. Walked straight through to the rear door and out on the rear platform.

Q. How long did you remain on the rear platform?

A. I remained there until she came to a standstill and then walked up — the train.

Q. Where was it stopped?

A. Part of it in front of the depot and part up to the lumber yard.

Q. What did you do then?

A. Went over to town; called for an officer; Mr. Cummings answered for the officer, and Mr. Creamer went over with him.

Q. Where did you go?

190 A. Went over with him.

Q. To Mr. Tomlinson?

A. Don't know whether it was him; they claimed it was.

Q. The man that was wounded?

A. Yes, sir.

Q. Then where did you go?

A. Went and got ice out of the caboose.

Q. Then where did you go?

A. To the head end of the train.

Q. Did you stay there until the train pulled out?

A. No, sir.

Q. Then where did you go?

A. To over near the depot.

Q. When did you count the cars?

A. About that time.

Q. Why did you count the cars?

A. Have reasons.

Q. What reasons?

A. The reason is, on an occasion of that sort the first question is, how many cars did you have in that train? How many cars did you go after you struck it until you stopped?

Q. Who asks that?

A. When the report goes out you are supposed to answer that.

Q. In whose employ are you?

A. Southern Pacific.

Q. What capacity?

A. Brakeman.

191 Q. Where at?

A. Tucson division.

Q. Where is that?

A. Running between Tucson and El Paso.

Q. That is a lighter job, isn't it, than running between Tucson and Yuma?
A. No, I don't think it is.
Q. That is all.

Mr. M. F. INGHAM, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. ALEXANDER:

Q. Where do you reside, Mr. Ingham?
A. Tucson.
Q. Where did you reside on the 24th of June last?
A. Tucson.
Q. At Tucson?
A. Yes, sir.
Q. What is your occupation?
A. At present?
Q. Yes.
A. Engineer.
Q. What was your occupation at that time?
A. Fireman.
Q. Where were you on the 24th day of June last—1891?
A. I was on engine 172 between Tucson and Yuma.
192 Q. On approaching Casa Grande that night, on the 24th day of June, do you know whether the whistle was blown or not?
A. I do.
Q. Was it?
A. Yes, sir.
Q. At what places?
A. At the mile post and the crossing post.
Q. Who done the blowing?
A. Mr. Gunn, the engineer.
Q. Was the bell rung that night on entering the station yard at Casa Grande?
A. It was, before we entered the yard.
Q. Who rang it?
A. I did.
Q. Where did you say you commenced ringing the bell?
A. At the corner of the section-house fence; below the tool-house.
Q. East of the tank?
A. Yes, sir.
Q. When did you stop ringing the bell?
A. I rang it up to the time of the accident.
Q. There was an accident then that night, was there?
A. Yes, sir.
Q. Please describe what that accident was and how it occurred; state the whole thing to the jury, what the accident was and how it occurred?

A. As we were entering the yard he had slowed the train
193 down; just as he released the air there was a man stepped on the track from my side of the engine and disappeared.

Q. What side of the engine is that?

A. Left-hand side.

Q. South or north side?

A. South side, I guess you would call it.

Q. How far ahead of the locomotive was it the man stepped on the track?

A. I should judge about twelve feet, as near as I could tell.

Q. After that what was done with the engine—the train?

A. Mr. Gunn reapplied the air and stopped the train.

Q. About what time of night was that?

A. That was 8.35 or 8.40—I have forgotten which it is.

Q. At the time this man stepped upon the track did you see the whole of his body?

A. No, I did not; all I could see was from his waist up.

Q. Please show the jury where you saw.

A. About up here (illustrates)—where the reflection of the light would strike him.

Q. For what reason, if any, if you know, Mr. Ingham, that you couldn't see the whole body of the man?

A. Well, the head-light sets up, you know, quite a distance from the track, and I couldn't see the lower part because the head-light doesn't shine close up to the engine.

194 Q. How long have you been engaged in railroad business?

A. Going on seven years.

Q. What has been your occupation during that time?

A. Fireman and engineer.

Q. At what rate of speed was the train running as it got to the water tank about entering the railroad yard?

A. Before we entered the yard?

Q. Yes.

A. About twenty-five miles an hour I guess; he had applied the air.

Q. Were you running with any steam before you got to Casa Grande?

A. Yes, sir; until we struck the whistling post; shut off steam there and roll.

Q. At what rate of speed do you think the train was running after it struck the the tank and passed into the yard?

A. About twelve miles an hour.

Q. After the train had stopped, Mr. Ingham, what did you do, if anything?

A. I lit the torch and got off the engine and went to see if I could see anything on the front end.

Q. What did you see?

A. Saw the flag-staff on the right-hand side was gone.

Q. Anything else?

A. There was a piece of white cloth there.

Q. Can you explain to the jury what you call the flag-staff, where it is situated and how high it stands?

195 A. It is on what we call the pilot beam; it commences at the beam and a rod runs up as big as my thumb for the purpose of putting on signals; cast-iron, I think it is.

Q. It was broken off where?

A. To the standard; a small part comes up above the standard.

Q. How high is the standard?

A. About so high (illustrates); might be higher.

Q. Was there any signal?

A. No, sir; there was no signal; it was night; we had taken them in and lit the green lights signals.

Q. On which side was that standard?

A. Right-hand side.

By Mr. ISRAEL:

Q. That would be the north side?

A. Yes, sir.

By Mr. ALEXANDER:

Q. At what distance was it you saw the man step upon the track east of this depot as near as you can recollect, or have you any recollection of it?

A. It was this side of the crossing; I hav-n't any recollection of it.

Q. You mean it was east of the crossing?

A. Yes, sir.

Q. Did you see the man at all afterwards?

A. No, sir; not after he passed in front of the engine.

Cross-examination.

By Mr. CAMPBELL:

Q. Did you see him before he stepped in front of the track?

196 A. Just as he stepped on the track; yes, sir.

Q. Then you didn't see him before that?

A. No, sir.

Q. You just saw him for an instant and no more?

A. Yes, sir; just for an instant.

Q. After he passed in front of the locomotive you lost sight of him?

A. Yes, sir.

Q. You say just at that time you had released the air?

A. Yes, sir.

Q. What do you mean by that?

A. That lets the brakes off.

Q. That lets the train go faster?

A. It naturally would; the cars behind would naturally push up against the engine.

Q. Where was the steam let off?

A. The other side of the mile post.

Q. And the train was running into Casa Grande without steam?
A. Yes, sir.
Q. On a down grade?
A. Yes, sir.
Q. How long have you been railroading?
A. Going on seven years.
Q. Up to the 24th of June in what capacity had you been railroading?
A. I had been firing and running, both.
Q. What do you mean by "running"?
197 A. Engineering; running an engine; doing an engineer's duties.
Q. How long before that had you been running an engine—before the 24th of June?
A. Off and on, whenever they wanted me.
Q. And you were firing instead of engineering on the 24th?
A. Yes, sir.
Q. How long a time prior to that had you been firing?
A. For a couple of months.
Q. What are you doing now?
A. Running extra, and working in the shop; working my year out.
Q. For the S. P.?
A. Yes, sir.
Q. Running engine?
A. Yes, sir.
Q. What run?
A. All over; I am an extra man; running from Yuma to El Paso.
Q. Which corner of the section-house did you commence ringing that bell?
A. The east corner.
Q. On the 25th which corner did you commence ringing the bell at?
A. The 25th I was not on the road.
Q. 29th?
A. The 29th I was not there.
Q. When was the next time you were on the road?
198 A. The day they had the coroner's inquest.
Q. When did you commence then?
A. At the crossing post on the other side; we were coming in from the west.

Mr. WILLIAM A. GUNN, being sworn and examined as a witness on the part of the defendant, testified as follows:

Direct examination:

Q. Where do you reside?
A. Tucson, Arizona.
Q. Where did you reside on the 24th day of June, 1891?
A. In Tucson.

Q. What is your business or occupation?
A. Locomotive engineer.
Q. How long have you been engaged in that business?
A. Fifteen years.
Q. Where were you on the 24th day of June, 1891?
A. Tucson, Arizona.
Q. Did you leave Tucson that day?
A. I did, at 6.00 p. m.
Q. And where did you go to?
A. To Yuma.
Q. To Yuma—in charge of a train?
A. In charge of a special stock train.
Q. About what time in the evening did you arrive at the east portion of the Casa Grande station yard that night?
199 A. Whistled for Casa Grande at 8.35 p. m. and stopped at the station at 8.40.
Q. Was the whistle blown or signals given as you approached Casa Grande that night?
A. Yes, sir.
Q. What were they?
A. One long whistle for the station, and one long and two short for the crossing post.
Q. Was the bell rung at any time?
A. It was—after I whistled for the crossing.
Q. How long was it rung?
A. Rung from the time we arrived at the east side of the section-house until we stopped.
Q. Did anything occur there that night that occasioned your stopping there?
A. It did.
Q. Please state to the jury now what that was.
A. We struck a man about 200 feet east of the depot crossing, knocking him off of the track.
Q. About how far in front of the locomotive was the man when he stepped upon the track and when you saw him?
A. When I saw him he was in the centre of the track, about probably twelve feet in front of the engine.
Q. Could you see the whole of the man's body at that time?
A. No, sir; only saw the head and shoulders.
Q. Please state the reason the whole of the body could not be seen.
200 A. The head-light is nine feet above the track and the ray of light is on an incline towards the track, and a man could step under the ray of light without being seen—part of him.
Q. If he was farther in front you could see him plain?
A. Yes, sir.
Q. How far can you see a man in front of a locomotive at night with the head-light burning?
A. Can see a man 200 feet or more.
Q. That night if there had been a man 200 feet in front of the locomotive would you have seen him?

A. Yes, sir.
Q. Were you on the lookout?
A. Yes, sir.
Q. From what side of the track did he step on the track?
A. From the left side.
Q. Where is your position in the engine?
A. On the right-hand side of the engine.
Q. What did you do after you found that a man had been struck?
A. Applied the air; made an emergency stop; as quick as I could.
Q. What distance did it take you to stop the train that night?
A. About twelve car-lengths.
Q. That would be about 360 feet, wouldn't it?
A. Yes, sir.
Q. After you stopped, Mr. Gunn, what did you then do?
201 A. Went back to see what the injury was; how much damage had been done; to see the man.
Q. Did you go back to see him?
A. Yes, sir.
Q. For what purpose did you go back to see him?
A. Because I knew I had struck a man; to see what damage had been done; to see whether he had been badly injured.
Q. Do you have to make any report of those things?
A. Yes, sir.
Q. Did you make any examination of the engine?
A. Yes, sir; after I went back to where the man was, I found the flag-staff had been broken.
Q. State what the flag-staffs are?
A. We put signals up for section of train; at night we carry green light without any flag.
Q. What is it made of?
A. A small iron rod set in a piece of cast iron on the beam; stands about four and a half inches high.
Q. Are you certain it was upon your engine when you entered the yard?
A. Yes, sir.
Q. And it was broken off after you stopped, upon examination?
A. Yes, sir.
Q. Did you ever get that flag-staff again?
A. Yes, sir.
Q. By what means?
A. I got it from the agent when I came back from Yuma the next trip.
202 Q. About how far in front of a locomotive, Mr. Gunn, will the reflection of a head-light throw its light?
A. Well, it will throw it plain about 600 feet.
Q. Sideways on each side about how far?
A. Well, I should judge about a hundred feet each way.
Q. With that class of train how quick can it be stopped upon the grade as it exists at Casa Grande, by the modern appliances?

A. By the automatic brake?
Q. Yes, sir.
A. Without using the engine it can be stopped in not much less than half a mile—without using the engine—going at twenty-five miles an hour.
Q. Going at the rate of twelve miles an hour?
A. With the air brake, about twelve car-lengths, not less.
Q. What did you use that night?
A. The Westinghouse air brake, latest improved.
Q. Cars all equipped with that brake?
A. Yes, sir.
Q. Did you reverse your engine that night?
A. No, sir.
Q. How long did you say you had been engaged in railroading?
A. Fifteen years.
Q. Have you ever had any experience in striking a person before?
A. Yes, sir; I did one man before this one.
203 Q. At what rate of speed were you running at that time?
A. Well, I was running as fast as I could; must have been running about thirty miles an hour.
Q. What effect did it have on the man?
A. Didn't hurt him at all.
Q. What did you do?
A. I stopped as quick as I could; took him to Danville, Illinois, expected him to die all the way, but it never hurt him at all.
Q. If you had been running about twenty miles an hour this night and struck him as you saw him struck what effect do you think it would have had?

Mr. CAMPBELL: Object.
The COURT: Objection sustained.

Q. How far did it throw the man from the track in Illinois?

Mr. CAMPBELL: Object.
The COURT: Objection sustained.

Q. That is all.

Cross-examination.

By Mr. ISRAEL:

Q. Where did you say you shut off steam?
A. Half a mile east of the east whistling post from Casa Grande.
Q. How far from the station?
A. A mile and a half.
Q. Pretty heavy grade going into Casa Grande?
A. Yes, sir.
204 Q. How fast were you running when you shut off steam?
A. About twenty-five miles an hour.
Q. Did you put on air then?
A. No, sir.

Q. When did you put that on?
A. About a mile out of Casa Grande.
Q. Pumping steam from the time you whistled until you struck this man?
A. No, sir.
Q. No exhaust when pumping steam?
A. No, sir.
Q. What time did you leave Tucson that night?
A. 6.00 p. m.
Q. What was your running orders?
A. Twenty-five miles an hour.
Q. Allowed anything over it?
A. Supposed to make twenty-five miles an hour.
Q. Could run as much over as possible?
A. No, sir; wasn't to exceed that; was to show twenty-five miles an hour from one telegraph station to another.
Q. What had you been doing that day before you left Tucson?
A. Slept about three hours in the afternoon.
Q. What time did you get up?
A. About four.
Q. Pulled out at six?
A. Yes, sir.
Q. What were you doing between four and six?
A. Ate supper.
205 Q. Drink any liquor?
A. No, sir.
Q. Drink before you went out?
A. No, sir.
Q. Didn't you drink so much liquor you had to be lifted into your cab that night?
A. No, sir.
Q. Havn't you so stated?
A. No, sir.
Q. Didn't you so state in the saloon of Charles Holborn before him and others that the night you left Tucson you were so full you had to be lifted up and put on the cab, but you made time anyway?
A. No, sir.
Q. In December last?
A. No, sir; never made any such statement.
Q. You say it was 8.35 when you whistled?
A. Yes, sir.
Q. How fast were you running when you got to the tank-house?
A. About twelve miles an hour.
Q. That might be fifteen?
A. No, sir.
Q. You let her slide, without using any steam, from there to where you struck the man?
A. Yes, sir.
Q. You are satisfied the bell was ringing all the time?
A. Yes, sir.

Q. You saw the man in front of the engine about twelve feet?

206 A. Yes, sir.

Q. So close you could see the body?

A. Yes, sir.

Q. Were you looking out the cab window?

A. Yes, sir.

Q. Where was your fireman—sitting at his window?

A. Yes, sir.

Q. Ringing his bell?

A. Yes, sir.

Q. You can see a man about 200 feet ahead?

A. Yes, sir.

Q. And a hundred feet on either side?

A. Yes, sir.

Q. Now, sir, if there had been a man 200 feet ahead of your engine and 50 feet from the other side, couldn't your fireman have seen him?

A. Yes, sir.

Q. Could you have seen him?

A. Yes, sir.

Q. Could you have seen him at a distance of 200 feet ahead and 50 feet from the left-hand rail?

A. Yes, sir. He was about the center of the track when I saw him.

Q. About twelve feet ahead?

A. Yes, sir.

Q. Near about the corner of the lumber yard?

A. Yes, sir; somewheres about that.

Q. You had been riveting your attention all the time on the track?

A. Yes, sir.

207 Q. And you saw no one in the vicinity of the track on either side?

A. No, sir.

Q. That is all, sir.

Mr. THOMAS LOVE, being sworn and examined as a witness on the part of the defendant, testified as follows:

By Mr. STONE:

Q. Where do you reside?

A. Casa Grande.

Q. What is your occupation?

A. Agent of the Southern Pacific Company.

Q. Where were you on the 24th of June last?

A. In Casa Grande.

Q. In what occupation or position at that time?

A. Agent.

Q. Were you present in Casa Grande at about half past eight on the evening of that day?

A. I was in Casa Grande all that day.

Q. Do you remember a freight train from the east coming in about that time—of a special coming in at that time?

A. I was not at the depot when the train came in; I remember the train coming in; my attention was called to it.

Q. How long have you lived at Casa Grande?

A. About five years and a half.

Q. What was the population about on the 24th of June last?

208 A. I think about 300; don't know exactly.

Q. Is Casa Grande a closely settled village, or is it scattered over considerable territory?

A. Well, it is neither one or the other; it is closely settled in some places and pretty much scattered in others.

Q. Mr. Love, will you look at that and tell what it is, if you know (handing witness Defendant's Exhibit "C")?

A. This is a picture of Casa Grande yard, looking east from point about opposite warehouse on the main line, and some of the buildings surrounding it on each side of the streets.

Q. Will you point out to the jury the depot building, the lumber yard, the tank, if it is represented there, and give the distances between those places as near as you can?

A. This is the lumber yard here; this is the north track, this is the south side track, and this is the track known as the main track passing the station; this is the lumber yard and office, and then there is a space from there to the tank open—nothing in there at all; on the other side, these buildings here, is the school-house, just opposite and a little west of the tank on the opposite side of the street; next is Marshall's; the next in sight is Mr. Tomlinson's place and the next is the residence of Mr. John C. Loss.

Q. What do you mean by "Tomlinson's place"?

A. Tomlinson's house.

Q. Will you point out on the likeness there, the photo-

209 graph, if you know of your own knowledge, where Mr. Tomlinson was found after the accident?

A. I was not there when he was picked up; didn't see him until after he was discovered and on a cot; I made a measurement to a place where the earth was disturbed in the main track and found some blood spots.

Q. At what point?

A. About 134 feet east of the east end of the depot—drawing an imaginary line at right angles with the depot to the track, and then 134 feet east.

Q. Did you see a flag-staff lying around Casa Grande at any point?

A. Yes, sir.

Q. Where at?

A. Seventy-five feet or twenty-five steps from the point just mentioned.

Q. What was the reason you searched for it?

A. I received a telegram——

Mr. CAMPBELL: Object.

The COURT: Objection sustained.

Q. Tell the jury about the flag-staff.

A. I was told it was lost——

Mr. CAMPBELL: Object; move to strike out.

A. I went there to find the flag-staff and found it at that point.

Q. Point out where you found the flag-staff?

A. This is the point here—75 feet east of this 134 feet.

Q. What is there to indicate those points?

210 A. A man standing 134 feet and a man standing 75 feet east of there.

Q. Will you look at this (handing witness Defendant's Exhibit "E")? What is that a representation of, if you know?

A. That is another view of a part of the same picture,—the same scene.

Q. From what point was that taken, if you know?

A. This was taken from near the corner of Loss's fence where it joins Smith's, I believe.

By Mr. CAMPBELL:

Q. Were you there when it was taken?

A. I saw the camera when it stood there.

By Mr. STONE, resuming:

Q. What time was it taken?

A. One or half past, in the afternoon, I believe.

Q. What day?

A. A week ago Sunday, I think it was.

Q. Is it represented on that photograph the location of Mr. Tomlinson's house or anything in front of his house, or anything you can recognize?

A. I can recognize the fence here, and that little boy there is standing about where his gate is.

Q. Is that a correct representation of the view looking east from there?

Mr. CAMPBELL: Object to that as incompetent.

The COURT: Have you any doubt about the testimony of Mr. Buehman on that subject?

211 Mr. STONE: No; if it is competent on the part of Mr. Buehman it is competent on the part of Mr. Love.

Q. Are you familiar with that country—with the view from that point?

A. I am unable to detect anything wrong about it.

Q. From the point where that child is, looking eastward, or from any other point between that and the railroad track as represented on that view, looking eastward, was there any obstruction to the view of the railroad for the first five miles—the railroad east?

A. Looking east, taking in the whole line of track?

Q. Yes.

A. There is nothing but a lot of ties here, and the raise in the ground; you can see the outline of the railroad—the telegraph poles—for a number of miles.

Q. Can a person see the head-light of a locomotive coming in for a distance of three miles?

A. You can see it further than that—eight or nine miles.

Q. (Handing witness Defendant's Exhibit "D.") Mr. Love, will you tell the jury what that photograph is a representation of?

A. This is a representation of part of the same scene.

Q. Taken from what point?

A. From a point twenty-two or twenty-three feet north, I forget which it is, north from the center of the main track, and 134 feet east of the depot.

212 Q. Does that show the point where the flag-staff was found?

A. It shows a point north of the side-track, opposite, at right angles, to the main track, where the flag-staff was found.

Q. How far from the depot building did you say it was the flag-staff was found, or about how far?

A. 209 or 210 feet.

Q. How far is it from the depot building to the west end of the lumber yard or lumber piles as they were piled that night, the 24th of June?

The COURT: Hav-n't you all that in evidence?

Mr. CAMPBELL: It is all marked down in the diagram.

Q. Were you in charge of the station at Casa Grande at that time?

A. Yes, sir.

Q. Do you know whether there were any cars—box cars or other cars—on any of the side tracks at Casa Grande that evening when the train came in?

A. I believe there were.

Q. At what points?

A. Near the west end of the depot.

Q. Were there any cars east of the depot on any side track?

A. Not that I know of.

Q. You are sure there were not?

A. I am certain there wer-n't immediately after the accident, unless they were switched there afterwards.

213 Q. Did you examine the yard at that time?

A. I did.

Q. Did you notice that evening at what point the engine of that train stopped after they came to a stop?

Mr. CAMPBELL: Object to that because he said he wasn't there at the time.

Q. That is all. Take the witness.

Cross-examination.

By Mr. CAMPBELL:

Q. East of the depot that night did you examine the yard there for the purpose of seeing whether there was any box cars on the north side track or not?

A. I didn't do it exactly for that purpose.

Mrs. BERTHA TOMLINSON, recalled on the part of the defendant.

Direct examination.

By Mr. ALEXANDER:

Q. On the night of this accident, Mrs. Tomlinson, where were you?

A. I was at my home in Casa Grande.

Q. Was any one there present with you?

A. Yes, sir.

Q. Who?

214 A. A lady by the name of Mrs. Johnson.

Q. Was your husband at home that evening?

A. Yes, sir.

Q. At about what time?

A. Between eight and nine o'clock, I can't say at what time.

Q. And about how long before you heard of the accident?

A. Well, it might have been ten minutes; I couldn't say just exactly how long.

Q. That is all.

Mr. ALEXANDER: That's the case for the defense.

Mr. CAMPBELL: Case for plaintiff, excepting the Carlyle tables.

The COURT: Any objection to them?

Mr. ALEXANDER: Not a bit in the world.

Mr. CAMPBELL: (Taken from Chambers' Encyclopedia, original edition, 1877, under heading of "Mortality," vol. VI, page 578). According to the Carlisle tables, the mean duration of human life at the age of forty years is twenty-seven years and seven months; at fifty years it is twenty-one years and one month.

The following is a view of the mean duration of life, at the beginning and at each decennial period, according to Carlisle:

215 Male and female combined.

Age.	Years.	Months.
0	38	9
10	48	10
20	41	6
30	34	4
40	27	7
50	21	1
60	14	4
70	9	2
80	5	6
90	3	3
100	2	3

Both sexes.

The cause was argued to the jury by counsel for the respective parties (during the argument, at the hour of 5.00 o'clock p. m., court took a recess, meeting again at 7.00 p. m.), after which the court instructed the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff seeks to recover in this action for damages resulting by reason of the death of Thomas Tomlinson occasioned by the negligence of the defendant. The particular negligence charged against the defendant and which must be proved by a preponderance of the evidence in order to entitle the plaintiff to recover, consists in running its trains through the town of Casa Grande at a great, rapid and unusual rate of speed and negligently and carelessly omitting while passing through said town of Casa Grande to give any signal or warning of its approach, by bell, whistle or otherwise.

216 The questions for you to determine in this case are, whether or not Thomas Tomlinson at the time and place and in the manner alleged in the complaint, lost his life by reason of the negligence of the defendant railroad company, without having himself contributed materially by his own negligence to that result. In addition to that, if you should find from the evidence that Thomas Tomlinson did so lose his life, then it would be for you to determine what injuries, if any, resulted, and determine what damages, if any, have been sustained by the plaintiff in this case.

Negligence is the omission to do something which a reasonable man, guided by those considerations and circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

The want of that care which men of common sense and common prudence exercise under like circumstances or employments is negligence. Negligence is that want of care which careful and prudent men ordinarily exercise under certain circumstances. This rule applies equally to the injured party and the party causing the injury; where both contribute to the injury there can be no recovery.

If a person, knowing that a train of cars is approaching at a rapid rate, attempts to cross the track of a railroad company in front of the approaching train at a distance of one hundred feet or less, such act is gross negligence, and if such person be injured or killed while making such attempt there can be no recovery for the injury to or death of such person.

217 The deceased (Tomlinson) was required to exercise a proper degree of care as well as the defendant and its servants, and if by the exercise of ordinary care or common caution he could have avoided the collision which resulted in his death, he was guilty of such negligence that precluded the plaintiff in this action from recovering, and your verdict should be for the defendant.

A person about to cross the track of a railroad is bound to exercise all reasonable care and caution to avoid an injury, even though it be at a public, well-known crossing over the track, and in his approach to the track or the crossing over the track it is incumbent

upon him to exercise great care and caution by looking and listening for any train that may be approaching, so as to avoid accident; otherwise he cannot recover for an injury received.

And if you find from the evidence that Tomlinson (plaintiff's intestate) attempted to cross the railroad track, and not at a public crossing, when a train was approaching in full sight, and that Tomlinson by using his ordinary sense of sight and caution could have seen a train as it approached in time to avoid the injury, then the court instructs you that he was guilty of gross negligence in attempting to cross the railroad track, and the plaintiff cannot recover.

The court instructs the jury that a neglect to sound the whistle or to ring the bell of an engine is not of itself such negligence as will justify a recovery for damages to a person injured upon a railroad track. To entitle the plaintiff to recover for such injury, it must also appear from the evidence that the injury or death
218 was the result of such omission to ring the bell or sound the whistle. The jury are instructed that it is not enough to create a liability for injury or death caused by a railroad train to prove that the bell was not rung or the whistle sounded; the jury must further find from the facts and circumstances proved that the injury was caused by reason of the neglect of not ringing the bell and sounding the whistle. For, a person attempting to cross a railroad track, particularly at a place where there is no public crossing, is bound to use his senses of sight and hearing, and to use extraordinary caution to avoid an injury, and if he be injured on the track, and such injury be not caused by wilful negligence of the persons in charge of the train, the injured person cannot recover, and under the statute of the Territory, if such person could not recover, neither the wife, widow, children or parents of such person can recover.

The jury are instructed as a matter of law that while the defendant railroad company was required to use and exercise reasonable and prudent precautions to avoid accident and danger in running its trains, it was also the duty of deceased to look out for the approach of a train, and to observe all reasonable precautions before attempting to cross the track. Every person is bound to know that the crossing of a railroad track, particularly at a place not a public crossing, is dangerous, and he is guilty of neglect unless he approaches the track as if it were dangerous. And if the jury believe from the evidence, or the evidence shows, that deceased, as he approached to cross or walk along the track did not look or listen to ascertain if a train was then approaching, or that by using
219 ordinary care of sight or hearing could have seen the train approaching, and used no reasonable or ordinary care to avoid the danger, but attempted to cross or walk upon the track when no necessity existed for him to be there, then the plaintiff cannot recover.

An engineer or lookout on an approaching train who sees a person on the track has a right to presume that such person sees the train coming and will get off the track to avoid injury, and is not

called upon to stop his train or blow the whistle or ring the bell, if such person was at the time on the private right of way of the company, and not at a public crossing. Nevertheless, the servants of the company's train would in such event, be bound to use ordinary care and precaution to avoid an injury; they have not a right in any event to wilfully cause an injury.

If you find from the evidence that Tomlinson, the deceased, knew that the train was approaching, and that he attempted to cross or walk the track in front of the approaching train, and at a place where there is no public crossing, then the court instructs you that it is immaterial whether the whistle was sounded or bell rung, or at what rate of speed the train was moving, as the act of attempting to cross the track under such conditions and circumstances was negligence, and the plaintiff cannot recover. Nevertheless, you may take into consideration that it is due for persons running railroad trains to exercise greater caution while running through towns and villages than in an uninhabited country. If it was upon a crossing of the railroad, each of the parties had a right to be there. It
220 is also a rule of law that a railroad train is not bound to stop or slacken its speed in approaching a railroad crossing; to require railroad trains to stop at public crossings would make almost impossible the speedy running of trains.

The jury are instructed that there can be no negligence imputed to the railroad company by reason of the rate of speed that the train was running merely; it is not a fact that bears on the question of negligence. Railroads, unless restricted by positive law, are to be governed only by the considerations of prudence as to the speed of their trains, and you are instructed that there is no law that restricts the rate of speed of trains at Casa Grande. Nevertheless, as stated before, they must run their trains there with as little liability of danger as possible; in an inhabited country they must give timely notice of their approach if they do run at a high rate of speed.

If the jury believe from the evidence that the death of Thomas Tomlinson was occasioned by the negligence of the defendant, you may give such damages as you may think proportionate to the injury resulting from such death, and the amount of such damages shall be divided among the persons entitled in such shares as you shall find by your verdict.

You are instructed that it is the duty of the defendant to cause a bell to be rung upon a locomotive at a distance of not less than eighty rods from the crossing of every public street, road or highway that crosses its track, and if injury occurs by reason of failure to ring such bell before reaching such crossing, the defendant is *prima facie* guilty of negligence.

The jury are instructed that if you find from the evidence
221 that a train of the defendant's cars ran through the village of Casa Grande at a rapid rate of speed and without giving warning of its approach by ringing of the bell, said defendant was *prima facie* guilty of negligence, and if injury occurred to any one crossing its track, it is liable for such injury, unless it is shown by

a preponderance of the evidence that the person injured was guilty of contributory negligence.

You are instructed that while Thomas Tomlinson was bound to use reasonable care to void injury, yet he was not held to the highest degree of care and prudence of which the human mind is capable, and to authorize a recovery Thomas Tomlinson needed not be wholly free from negligence, provided his negligence was but slight and the defendant be guilty of gross negligence, and provided his negligence did not materially contribute to the injury which he sustained.

If the jury find from the evidence that the defendant was guilty of the wrongfuly act, neglect or default charged in the complaint, and that the same resulted in the death of the deceased, and that the plaintiff is entitled to a verdict, then the plaintiff is entitled to recover for the benefit of herself, the deceased's parents, and her children, such an amount of damages as the jury believe from the evidence to be a fair compensation to such widow and kin, having reference to the pecuniary loss resulting from such death. And in estimating the pecuniary injury you have a right to take into consideration the support of said widow and minor children, and the instruction and physical, moral and intellectual training, as well as the ages of said minor children, so far as these matters have been proven, in determining the amount of damages.

222 I shall submit to you and have you return with your verdict certain special interrogatories, which you will cause to be signed by your foreman and returned into open court when you return your verdict.

The first is: At the place where the occurrence took place could Thomas Tomlinson in his senses, by using his sense of hearing and sight, have known of the approach of the train that inflicted the alleged injury, in time to have by the exercise of ordinary care avoided collision with the train? That question you can answer by yes or no. Having determined, you can append to it: We the jury answer the above interrogatory, yes or no, and cause it to be signed by your foreman.

Second. Was the head-light of the locomotive which struck Tomlinson lighted on the night and at the time of the collision? Having determined that, the form of your answer will be: We the jury for answer to the second interrogatory say yes or no, as the case may be, and cause it to be signed by your foreman.

The third interrogatory is: Did Thomas Tomlinson know that this train was coming the night of the accident? Having determined that, the form of your answer will be: We the jury for answer to the third interrogatory say yes or no, as the case may be, and cause it to be signed by your foreman.

Fourth. At Casa Grande station the night of the accident, was there anything to obstruct the view of the train approaching from the east by one approaching the track from either side at or near the scene of the accident? If you find there was an obstruc-

223 tion upon both sides, so state; if you find upon one side or the other, state which side—say the north or south side of the track.

You will also return a general verdict, the form of which will be: We the jury duly empanelled and sworn in the above-entitled action, find for the plaintiff and assess damages against the defendant in the sum of $——, to be divided as follows: Then follow blanks in which you will apportion the sums for the persons named in the complaint.

The other form of verdict is: We the jury find for the defendant.

Whichever one you agree upon you will cause to be assigned by your foreman and return into open court.

(Jury retired at 8.55 p. m. in custody of an officer, to deliberate on their verdict.)

W. L. PINNEY,
Stenographer and Typewriter, Phœnix, Arizona.

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

I, W. L. Pinney, a stenographer, do hereby certify that upon June 6th and 7th, 1892, I was in attendance upon the district court of the second judicial district of the Territory of Arizona, in and for the county of Pinal, and that on those days I was employed to and did report the proceedings had in the case of Bertha Tomlinson *vs.* Southern Pacific Company, in short-hand, and that the preceding pages contain a full, true and complete transcript of
224 the evidence introduced and proceedings had at said time as appears from said short-hand notes, and that said notes correctly represent the proceeding had upon the trial of said case.

Witness my hand this thirteenth day of June, 1892.

W. L. PINNEY,
Court Stenographer.

After deliberation, the jury returned into court with the following verdict, which was filed June 7, 1892:

We the jury duly impanelled and sworn in the above-entitled action find for the plaintiff and assess damages against the defendant in the sum of $50,000, to be divided as follows:

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

C. D. HENRY, *Foreman.*

(First interrogatory.)

At the place where the occurrence took place could Thomas Tomlinson in his senses by using his sense of hearing and sight have known of the approach of the train that inflicted the alleged injury

in time to have by the exercise of ordinary care avoided collision with the train?

We the jury answer the above interrogatory, No.

C. D. HENRY, *Foreman.*

225 (Second interrogatory.)

Was the head-light of the locomotive which struck Tomlinson lighted on the night and at the time of the collision?

We the jury for answer to the second interrogatory say Yes.

C. D. HENRY, *Foreman.*

(Third interrogatory.)

Did Thomas Tomlinson know that this train was coming the night of the accident?

We the jury for answer to the third interrogatory say No.

C. D. HENRY, *Foreman.*

(Fourth interrogatory.)

At Casa Grande station, the night of the accident was there anything to obstruct the view of the train approaching from the east by one approaching the train from either side at or near the scene of the accident?

We the jury in answer to the above interrogatory say Yes, on the north side.

C. D. HENRY, *Foreman.*

That hereafter, to wit: Upon the 8th day of June, 1892, counsel for defendant filed the following motion to set aside verdict and grant new trial herein:

(Title of Court and Cause.)

Now comes the defendant and moves the honorable court to set aside the verdict rendered herein June 7th, 1892, and to grant a new trial of this cause on the following grounds, viz:

226 First. Errors of law committed by the court during the progress of the trial, which will be fully set forth in statement of facts and bill of exceptions to be filed and settled.

Second. That the evidence is insufficient to support the verdict.

Third. That the verdict is against the law.

Fourth. That the verdict is against the law and the evidence.

Fifth. That the damages assessed by the jury in their verdict are excessive, unsupported by the evidence, and were given under the influence of passion and prejudice.

This motion is based upon the minutes of the court, records of the case and statement of facts and bill of exceptions to be hereafter filed.

H. N. ALEXANDER AND
W. R. STONE,
Att'ys for Def't.

That thereafter, to wit, on the 10th day of June, 1892, the plaintiff in open court, made, extended on the minutes of the court and docketed and filed and offered a remittitur, which is in words and figures as follows:

Bertha Tomlinson	$8,000,	remitted to		$6,000
Alice Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson	8,000,	"	"	3,000
Howard Tomlinson	8,000,	"	"	3,000
Baby Tomlinson	8,000,	"	"	3,000
Fenton Tomlinson (father)	5,000,	"	"	1
Mary Tomlinson (mother)	5,000,	"	"	1

227 Thereby making a total remittance of $31,998 and allowing the verdict to stand in the sum of $18,002.

BAKER & CAMPBELL AND
G. C. ISRAEL,
Attorneys for Plaintiff and Beneficiaries.

That thereafter, and on the — day of June, 1892, the defendant filed the following bill of exceptions herein:

(Title of the Court and Cause.)

Be it remembered that on the trial of this action on the 7th day of June, 1892, and after the plaintiff had introduced all of their testimony and rested the case, the following instruction was presented to the court and asked to be given, to wit:

Instruction asked by defendant at close of plaintiff's evidence, requested on the ground that the evidence shows conclusively that plaintiff's intestate (Tomlinson) was grossly negligent in attempting to cross the track with an approaching train in full view.

Instruction.

The evidence in this case shows that Thomas Tomlinson (plaintiff's intestate), who was killed by the train, did not use ordinary care in crossing the railroad track of the defendant, and under the law is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant.

Endorsed by the presiding judge: "Tendered by defendant at close of plaintiff's case and refused.

"J. H. KIBBEY, *Judge.*"

228 To which ruling the defendant then and there duly excepted and time was given during the continuance of this term to prepare and file bill of exceptions thereto.

And be it further remembered, that on the said 7th day of June, 1892, the jury duly impanelled in the above action rendered the following verdict:

We the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff and assess damages against the defendant in the sum of $50,000, to be divided as follows:

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

C. D. HENRY, *Foreman.*

And be it further remembered that on the 8th day of June, 1892, defendant moved the court to set aside the verdict and grant defendant a new trial for the reasons therein set forth.

That on the 10th day of June, 1892, plaintiff in open court made, filed and offered a remittitur which is in words and figures as follows, to wit:

Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict heretofore rendered herein in the sum of fifty thousand dollars the following sums:

229	Bertha Tomlinson	$8,000,	remitted to	$6,000
	Alice Tomlinson	8,000,	" "	3,000
	Fenton Tomlinson	8,000,	" "	3,000
	Howard Tomlinson	8,000,	" "	3,000
	Baby Tomlinson	8,000,	" "	3,000
	Fenton Tomlinson (father)	5,000,	" "	1
	Mary Tomlinson (mother)	5,000,	" "	1

Thereby making a total remittance of $31,998 and allowing the verdict to stand in the sum of $18,002.

BAKER & CAMPBELL AND
G. C. ISRAEL,
Attorneys for Plaintiff and Beneficiaries.

Defendant objected to the remittance being allowed, whereupon the court sustained the remittance, overruled the motion for new trial and ordered judgment for the sum of $18,002, to which the defendant then and there duly excepted and now makes and files this bill of exceptions during and at this term of court.

H. N. ALEXANDER AND
W. R. STONE, *Att'ys for Def't.*

It is hereby agreed that the foregoing is a correct statement of the evidence offered and admitted at the trial of said action, and contains all the evidence except Exhibits A, B, C, D, E, and life tables and states all proceedings had from bringing in of verdict to the rendering of judgment.

July 6th, 1892.

230 STONE & ALEXANDER,
Att'ys for Def't.
BAKER & CAMPBELL AND
G. C. ISRAEL,
Attorneys for Plaintiff.

Approved.
JOSEPH H. KIBBEY, *Judge.*

(Endorsed:) Filed July 9th, 1892. Burton J. Hawley, clerk.

And thereafter the defendant filed its assignment of errors, in the words and figures following:

In the Supreme Court of the Territory of Arizona.

BERTHA TOMLINSON, Appellee and Plaintiff,
vs.
THE SOUTHERN PACIFIC CO., Appellant and Defendant.

Assignment of Errors.

I.

The court erred by refusing to direct a verdict for the defendant at the close of plaintiff's case as requested by the defendant.

The evidence, circumstances and inferences drawn therefrom at that time showed plainly that the real cause of the accident and injury was not because the whistle was not sounded, bell not
231 rung, or great speed of the train, (if such were the fact), but that the direct cause of the injury was the neglect of the deceased to use the common required ordinary care, by looking and listening, before attempting to cross a railroad track.

That the train which caused the injury was seen by each and every witness for the plaintiff at long distance; that at the place where the accident occurred any person with sense of sight or hearing could have seen this train approaching by stopping and looking before going on the main track. There was no evidence to show that deceased was free from negligence, but to the contrary all the inferences *was* that deceased contributed to the injury by not listening or looking before attempting to cross the track with a train approaching in full view.

At the close of the plaintiff's testimony there was nothing for the jury. The question of negligence, statutory or otherwise, was a question of law for the court, and not of fact for the jury. And 'twas error of the court not to direct a verdict for defendant on evidence of plaintiff.

II.

The court erred in overruling defendant's motion for a new trial.

The verdict as rendered by the jury was unsustained by any evidence in the case. There was no evidence showing or tending to show that the injury to Tomlinson was caused by negligence of defendant, its agents or employees. But to the contrary, the whole evidence with the justifiable inferences therefrom show conclusively that the injury to Tomlinson was the result of his own reck-
232 less negligence and want of ordinary care. There was no evidence proving or tending to prove that Bertha Tomlinson, and her cobeneficiaries, children and parents of deceased, were damaged or suffered actual damage by the death of Tomlinson, in

the sum of fifty thousand dollars, or in any sum of money whatever, or that either of them suffered a damage in the amount awarded them by the verdict of the jury. The verdict on its face shows (in the light of the law and the evidence) that it was rendered by the jury under the influence of prejudice, passion or other improper motive, and not upon the law or evidence of the case. Being excessive, beyond reason, and not warranted or sustained by any evidence.

The court should have granted defendant's motion for a new trial, and 'twas error of the court overruling the motion.

III.

The court erred in allowing Bertha Tomlinson, one of the parties interested in the suit, to remit a portion of the verdict, and rendering a judgment for the part not remitted, *i. e.*, $18,002. That she, as nominal plaintiff suing for herself and other parties equally entitled, nor her counsel, had no power or authority to remit any portion of the verdict rendered, except the portion (possibly) awarded her by the jury in her verdict, *i. e.*, $8,000.

That the only interest she had in the subject-matter of the action was the same as her cobeneficiaries as named in the complaint.

That neither could remit for the other. That the judgment was not based on any verdict of a jury, nor any evidence in the
233 case. The verdict was a vicious one as rendered, and the remittitur could not cure the vice.

IV.

The court erred in rendering a judgment for plaintiff and her cobeneficiaries named as entitled to recover. The judgment of the court should have been for the defendant.

There was no more evidence to sustain the judgment of the court for $18,002 than there was to sustain the verdict of the jury for $50,000 which the court set aside.

The court in giving a judgment usurped the powers and duties of a jury as provided by the statute:

First. By rendering a judgment for plaintiff after setting aside the verdict.

Second. By dividing the gross damage into shares among the parties alleged to be entitled in complaint. This matter being exclusively within the power of the jury, as provided by par. 2155, title 36, entitled "injuries resulting in death," R. S. 1887.

For these errors the judgment should be reversed.

V.

The court erred in overruling defendant's motion for a new trial.

There being no evidence to prove, or tending to prove, gross, culpable or any negligence on the part of the defendant, causing the accident, but to the contrary the evidence, facts, circumstances and justifiable inferences all show conclusively that the proxi-
234 mate cause of the injury to Tomlinson, the deceased, was his own want of required ordinary care in attempting to cross a

railroad track in front of a moving train of cars in full view. And there being no evidence to prove or sustain the damage as allowed by the court, or any evidence to show in any way what portion of the damage allowed by the court in gross should be awarded or divided among the six persons named in the complaint as entitled to share in the recovery.

For these errors the judgment as rendered by the court should be set aside, reversed, and judgment ordered entered by the court below for the defendant, as provided by par. 949, chap. 3, title 16, R. S. Arizona, 1887.

W. R. STONE AND
H. N. ALEXANDER,
Att'ys for Appellant.

(Endorsed:) Filed Aug. 15th, 1892. Burton J. Hawley, clerk.

TERRITORY OF ARIZONA, }
County of Pinal, } *ss:*

I, Burton J. Hawley, clerk of the district court of the second judicial district of the Territory of Arizona, in and for the county of Pinal, do hereby certify the above and foregoing to be a full, true and correct copy of the complaint, demurrer and answer, amended answer, minute entries of the court proceedings, verdict of the jury, motion for a new trial, remittitur, judgment, bill of exceptions, motion to retax costs, statement of facts, assignment of errors
235 and bond of appeal in the case of Bertha Tomlinson, plaintiff, *vs.* The Southern Pacific Company, defendant; I do hereby further certify that the costs incurred by the plaintiff in said action, as shown by the records of my office, to be the sum of nine hundred and seventy-eight dollars and fifty-five cents ($978.55), and those of the defendant to be the sum of one hundred and twenty dollars and twenty cents ($120.20).

In witness whereof, I have hereunto set my hand and affixed the seal of the said district court, this the 26th day of August, A. D. 1892.

[SEAL.] BURTON J. HAWLEY, *Clerk.*

Transcript was demanded by H. N. Alexander, of counsel for the defendant, on the 5th day of August, 1892, and forwarded by mail to said H. N. Alexander, of counsel for the defendant, on the 26th day of August, 1892.

BURTON J. HAWLEY, *Clerk.*

236 In the Supreme Court of the Territory of Arizona, January, 1893, Term.

THE SOUTHERN PACIFIC COMPANY, Appellant,
vs.
BERTHA TOMLINSON, Appellee.

Judgment.

Opinion by SLOAN, *J.:*

This cause coming on regularly to be heard, and having been by the court duly considered, it is ordered that the judgment made and entered in the district court of the second judicial district of the Territory of Arizona in and for the county of Pinal, in favor of Bertha Tomlinson, plaintiff and appellee, against The Southern Pacific Company, defendant and appellant, be, and the same is hereby, affirmed.

And it is further ordered and adjudged and decreed that the said Bertha Tomlinson, plaintiff and appellee, do have and receive of and from The Southern Pacific Company, defendant and appellant, and Leo Goldman, W. T. Smith, B. Heyman, and John
237 Y. T. Smith, its sureties on appeal, the sum of $18,002.00, with — thereon from the 11th day of June, 1892, at the rate of seven per cent. per annum, together with her costs in the said district court, taxed at the sum of $978.55, and her costs on appeal, taxed at —.

April 14th, 1893.

Gooding, C. J., and Wells, J., concurring.

238 In the Supreme Court of the Territory of Arizona.

THE SOUTHERN PACIFIC COMPANY, Appellant,
vs.
BERTHA TOMLINSON, Appellee.

Baker & Campbell and G. C. Israel, for appellee.
H. N. Alexander and W. R. Stone, for appellant.

Opinion by SLOAN, *J.:*

This action was brought under the provisions of title 36, Revised Statutes, 1887, entitled "Injuries resulting in death."

Plaintiff, Bertha Tomlinson, as the widow of Thomas Tomlinson, deceased, brought suit in her own name against the Southern Pacific Company, for the benefit of herself as surviving wife as well as for the children and parents of the deceased, to recover damages sustained by the death of said deceased, which occurred, as alleged, by reason of the negligence of said defendant.

In addition to a special verdict the jury returned a verdict for plaintiff in the sum of $50,000.00; which amount was ap-
239 portioned among the beneficiaries named in the complaint as follows:

Bertha Tomlinson (plaintiff)	$8,000 00
Fenton Tomlinson (father)	5,000 00
Mary Tomlinson (mother)	5,000 00
Alice Tomlinson (child)	8,000 00
Fenton Tomlinson (child)	8,000 00
Howard Tomlinson (child)	8,000 00
Baby Tomlinson (child)	8,000 00

The defendant moved the court to set aside the verdict and grant a new trial on the ground, among others, that the verdict was excessive and rendered under the influence of passion or prejudice.

Whereupon plaintiff, by her attorneys, filed a remittitur, which was in words and figures following, to wit:

"Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict heretofore rendered herein in the sum of $50,000.00 the following sums:

Bertha Tomlinson	$8,000, remitted to	$6,000
Alice Tomlinson	8,000, remitted to	3,000
Fenton Tomlinson	8,000, remitted to	3,000
Howard Tomlinson	8,000, remitted to	3,000
Baby Tomlinson	8,000, remitted to	3,000
Fenton Tomlinson (father)	5,000, remitted to	1
Mary Tomlinson (mother)	——, remitted to	1

thereby making a total remittance of $31,998.00, and allowing the verdict to stand in the sum of $18,002.00."

The court then overruled the motion for a new trial and entered judgment for plaintiff in accordance with the remittitur.

240 It is alleged by appellant that the court erred in allowing the remitt-ur and entering judgment in accordance therewith, first, for the reason that the plaintiff had no power to remit any portion of the damages awarded by the jury, except, perhaps, the portion allowed to her by the verdict, and, second, for the reason that, the damages being excessive, it was evident that the jury, in returning any verdict for plaintiff, acted through passion or prejudice, and therefore a remitt-ur could not possibly operate to cure the verdict thus wrongfully found.

As to the right of the nominal plaintiff in an action for damages on account of injuries causing death, we are not cited to any authorities directly in point. Independent of the statute the right to maintain such an action does not exist. We are, therefore, left, in determining this question, solely to a consideration of the sections of the statute which bear upon the question.

Paragraph 2149, Revised Statutes, being section 5 of said title 36, provides that "the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of deceased."

Section 2150 provides that "the action may be brought by all the parties entitled thereto or by any one or more of them for the benefit of all."

241 The paragraph last quoted gives the widow authority to bring suit for herself, children, and parents of the deceased, if any there be living at the time of the death of the deceased. The authority to bring, it seems to us, includes also full authority to prosecute, control, and direct the suit to its final determination.

If to prevent a new trial being granted it be necessary to remit a portion of the damages awarded by the jury, we see no reason why she may not, under the statute, remit such portion or portions as may be necessary to that end, and which she may consider in good conscience ought to be remitted.

To hold otherwise would, we think, be construing the statute to place the plaintiff in this sort of an action at a disadvantage to plaintiffs in other forms of action.

While the record does not affirmatively show that the trial court made a remission of a portion of the damages awarded a condition precedent to his overruling the motion for a new trial, the damages awarded being clearly excessive, we think it quite evident that had the remitt-ur not been filed the court would have granted the motion.

A trial court has the power, where excessive damages has been allowed by the jury and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power
242 rests in the sound discretion of the trial court. This doctrine is affirmed in the case of Arkansas Cattle Company *vs.* Mann, 130 U. S., 74; also in Northern Pacific Railroad Company *vs.* Herbert, 116 U. S., 642.

Of course if it is apparent to the trial court that the verdict was the result of passion or prejudice a remitt-ur should not be allowed, but the verdict should be set aside. In passing upon this question the court should look not alone to the amount of the damages awarded, but to the whole case, to determine the existence of passion or prejudice and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances as they may appear to the trial court indicate that the jury deliberately disregarded the instructions of the court or the facts of the case a remitt-ur should not be allowed, but a new trial should be granted. If they do not so indicate and the plaintiff voluntarily remits so much of the damages as may appear to be excessive the court in its discretion may allow the remission and enter judgment accordingly. Arkansas Cattle Company *vs.* Mann, cited above. From a review of the whole case we cannot say that the jury in finding for the plaintiff in this action in a sum largely in excess of the damages proven deliberately disregarded the facts or the instructions of the court.

We rather incline to the view that the jury, having found
243 the issues in favor of plaintiff, was then prompted, through sympathy for the widow and children and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted.

The refusal of the trial court at the close of plaintiff's case to

direct the jury to return a verdict for the defendant, at the request of defendant, is assigned as error.

The deceased, Thomas Tomlinson, a merchant living in the village of Casa Grande, A. T., about 9 o'clock in the evening of June 24th, 1891, while crossing the railroad track of defendant within the confines of said village, was struck by a passing freight engine and died soon after from the injuries received.

The testimony on the part of plaintiff tended strongly to show that at the time of the accident the train, which was a special freight, was running at a high rate of speed, and that, contrary to the custom of defendant and in violation of the provisions of paragraph 322, Revised Statutes 1887, no bell was rung or other warning given of its approach.

The village of Casa Grande extends along on each side of the defendant's track, which runs at this point in an east-and-west direction.

South of the track and facing it is a row of dwellings, in one of which deceased was living, while north of the track are a
244 number of business houses, one of which was the store of deceased. It was shown that the place where the deceased was struck was used as a crossing by him and the other residents living south of the track in going to and from the north side. At this point there is the main track and on each side a side track. From the south side the view of the track to the east, from which direction the train which struck deceased was coming, was open and unobstructed for a considerable distance. On the north side extending east from the place of the accident for some distance along the side track was a large pile of lumber, high enough to hide an approaching train. Near the west end of this lumber pile two box cars were standing on the north side track. To the east of the lumber pile, near the track, there is a house used as an office by the company owning the lumber. It was shown that several minutes prior to the arrival of the train deceased left his home on the south side to cross over to the north side. The theory of the plaintiff was that deceased on returning from the north side was run into by the passing train. While none of the witnesses on the part of the plaintiff saw deceased at the time of the accident, there were circumstances shown which tended strongly to establish this theory as the correct one. One of the witnesses, standing on the south side of the track and about 75 feet from the crossing, was watching the ap-
245 proaching train until it stopped opposite him, and saw no one step on the track from the south side. It was also shown that the injuries received by the deceased were on the left side of the body. It was also shown that a flag-staff on the right side of the cow-catcher of the engine was broken off and found near the body of the deceased. We think the case as made out by the plaintiff sufficient to justify the court in leaving the question of negligence on the part of the defendant to the determination of the jury, as well as the question of contributory negligence or its absence on the part of deceased. Counsel for appellant urge in their brief that the request should have been granted for the reason that plaintiff

failed to show due care and caution on the part of deceased in attempting to cross the track at the time of the accident. The rule in this Territory, as declared by the supreme court in the case of Lopez *versus* Central Arizona Mining Company, 1 Ariz., 464, is that in actions for personal injuries where contributory negligence is relied upon as a defense due care and caution on the part of plaintiff, in the absence of affirmative proof to the contrary, will be presumed, and the burden of proving such contributory negligence rest- upon the defendant. The same rule has been applied by the Supreme Court of the United States.

Railroad Company *vs.* Gladman, 15 Wall., 401; Indianapolis and St. Louis Railroad Company *vs.* Horst, 93 U. S., 291.

246 In actions for damages in injuries causing death the same rule prevails as in ordinary actions for damages for personal injuries. We think the trial court very properly denied defendant's request that the jury be directed to return a verdict for the defendant. We think the judgment should be affirmed, and it is so ordered.

RICHARD E. SLOAN, *A. J.*

Henry C. Gooding, C. J., and Wells, A. J., concurring.

(Endorsed:) No. 354. In the supreme court of the Territory of Arizona. Southern Pacific Company, appellant, *vs.* Bertha Tomlinson, appellee. Opinion by Sloan, J. Filed June 16, 1893. T. D. Hammond, clerk.

247 In the Supreme Court of the Territory of Arizona.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,
vs.
BERTHA TOMLINSON, Defendant in Error.

Petition for Allowance of Writ of Error.

To the honorable the justices of the supreme court of the Territory of Arizona:

The Southern Pacific Company, a corporation and plaintiff in error herein, most respectfully represents to your honors that it is the defendant (and plaintiff in error) in the proceedings and action hereinafter mentioned, and that Bertha Tomlinson is the plaintiff (defendant in error) in said proceedings.

The said action was originally brought in the district court of the second judicial district of Arizona Territory in and for Pinal county on the 21st day of October, 1891.

On the 4th day of December, 1891, the defendant filed its answer therein.

On the 7th day of June, 1892, the cause was brought on for trial to a jury, and the jury rendered a verdict in favor of plaintiff for fifty thousand ($50,000) dollars damages.

On the 8th day of June, 1892, the defendant served and
248 filed its motion to set aside the said verdict and for a new trial.

On the 11th day of June, 1892, the plaintiff filed a remitt-er of all of said verdict in excess of eighteen thousand and two ($18,002.00) dollars, and the court thereupon overruled defendant's said motion and rendered and entered judgment in favor of plaintiff and against the defendant for the sum of $18,002.00 and costs; and thereafter and within the time required by law the defendant duly perfected an appeal therefrom to this honorable court, which, on the fourteenth day of April, 1893, affirmed said judgment and rendered judgment accordingly.

And the defendant and appellant in said action (plaintiff in error herein), being dissatisfied with the judgment made and entered in said action and the judgment of this court in affirmance thereof, and feeling itself aggrieved thereby and by the said action of said court in awarding a judgment in favor of the said Bertha Tomlinson, plaintiff as aforesaid (defendant in error herein), for the said sum of $18,002.00 and costs, and that under the evidence the judgment should have been in favor of the plaintiff in error, and that such judgment is contrary both to the law and the evidence, comes now, by its attorneys, H. N. Alexander and W. R. Stone, and petitions the said court for an order allowing said defendant (plaintiff in error herein) to prosecute a writ of error to the honorable Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided.

249 And that also an order be made fixing the amount of security which the defendant (plaintiff in error herein) shall give and furnish upon said writ, to operate as a supersedeas, in said action, and that upon the giving of such security all further proceedings in the supreme court of the Territory of Arizona and said district court of the second judicial district of the Territory of Arizona in and for Pinal county be suspended and stayed until the determination of said cause upon said writ of error by the said Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray.

H. N. ALEXANDER AND
W. R. STONE,
Attorneys for Plaintiff in Error, Defendant and Appellant.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson, defendant in error. Petition for allowance of writ of error. Filed May 12, 1893. T. D. Hammond, clerk.

250 In the Supreme Court of the Territory of Arizona.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,
vs.
BERTHA TOMLINSON, Defendant in Error.

Assignment of Errors.

The Southern Pacific Company, having petitioned said court for an order permitting it to prosecute a writ of error to the honorable Supreme Court of the United States from the judgment made and entered in said court, now makes and files with its said petition the following, and specifies the same as its assignment of errors herein and upon which it will rely for a reversal of said judgment upon said writ:

I.

The court erred in refusing to direct a verdict for defendant at the close of plaintiff's case, as requested by defendant, upon the ground that the evidence affirmatively shows contributory negligence on the part of the deceased.

II.

The court erred in overruling defendant's motion to set aside said verdict and for a new trial.

251 III.

The court erred in allowing plaintiff, one of the parties interested in the suit, to remit a portion of the verdict and in rendering a judgment for the part not remitted.

Wherefore, by reason of the foregoing assignment of errors and the petition of the defendant (plaintiff in error herein) for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiff in error submits its said petition and these assignments of error, and prays for an order of this honorable court allowing it to prosecute such writ to said Supreme Court of the United States.

H. N. ALEXANDER AND
W. R. STONE,
Attorneys for Plaintiff in Error, Defendant and Appellant.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson, defendant in error. Assignment of errors. Filed May 12, 1893. T. D. Hammond, clerk.

252 In the Supreme Court of the Territory of Arizona.

BERTHA TOMLINSON, Appellee,
vs.
SOUTHERN PACIFIC COMPANY, Appellant.

Order Allowing Writ of Error.

And now, on this 12th day of May, 1893, on motion of H. N. Alexander and W. R. Stone, of counsel for appellant, it is ordered that a writ of error herein be and is hereby allowed, and that, in order to stay execution pending the writ of error, the appellant shall file a supersedeas bond in the sum of ($40,000) forty thousand dollars.

HENRY C. GOODING,
Chief Justice.

(Endorsed:) In the supreme court of the Territory of Arizona. Bertha Tomlinson, appellee, *vs.* Southern Pacific Company, appellant. Order allowing writ of error. Filed May 12, 1893. T. D. Hammond, clerk.

253 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the Territory of Arizona, before you or some of you, between The Southern Pacific Company, a corporation, plaintiff in error, and Bertha Tomlinson, defendant in error, a manifest error hath happened, to the great damage of the said Southern Pacific Company, a corporation, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the 13th day of July, 1893, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid

254 being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Seal of the Court. Chief Justice of the Supreme Court of the United States, the 12th day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of

the Independence of the United States the one hundred and eighteenth.

T. D. HAMMOND,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed this 12th day of May, 1893.

HENRY C. GOODING,
Chief Justice of the Supreme Court of the Territory of Arizona.

I hereby certify that a copy of the foregoing writ of error was on the 12th day of May, 1893, lodged in the clerk's office of said supreme court of the Territory of Arizona for the said defendant in error.

T. D. HAMMOND,
Clerk of the Supreme Court of the Territory of Arizona.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, *defendant* in error, *vs.* Bertha Tomlinson, defendant in error. Writ of error. Filed May 12, 1893. T. D. Hammond, clerk.

255 In the Supreme Court of the Territory of Arizona.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,
vs.
BERTHA TOMLINSON, Defendant in Error.

Know all men by these presents that we, Southern Pacific Company, as principal, and Charles F. Crocker and A. N. Towne, as sureties, are held and firmly bound unto Bertha Tomlinson in the full and just sum of (40,000) forty thousand dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of May, 1893.

Whereas the said action was originally brought in the district court of the second judicial district of Arizona Territory in and for Pinal county on the 21st day of October, 1891, and on the 4th day of December, 1891, the defendant filed its answer therein, &

256 on the 7th day of June, 1892, the case was brought on for trial to a jury, and the jury rendered a verdict in favor of plaintiff for fifty thousand ($50,000.00) dollars damages, and on the 8th day of June, 1892, the defendant served and filed its motion to set aside the verdict and for a new trial, and on the 11th day of June, 1892, plaintiff filed a remitter of all of said verdict in excess of eighteen thousand ($18,002.00) and two dollars, and the court thereupon overruled defendant's said motion and rendered and entered judgment in favor of plaintiff and against the defendant for the sum of eighteen thousand and two ($18,002.00) dollars and nine hundred and seventy-eight and fifty-five hundredths ($978.55) dollars costs, and thereafter & within the time required by law the defendant duly perfected an appeal therefrom to this honorable

court, which on the fourteenth day of April, 1893, affirmed said judgment & rendered judgment accordingly; and—

Whereas upon the 12th day of May, 1893, the said Southern Pacific Company filed in said supreme court of the Territory of Arizona its petition for an order allowing it to prosecute a writ of error to the Supreme Court of the United States and for an order of said court fixing the amount of security which it shall be required to give to the plaintiff in said action pending the prosecution of said writ of error, to operate as a supersedeas and stay of execution until said writ of error shall have been heard and determined in said United States Supreme Court; and—

257 Whereas upon the 12th day of May, 1893, the said supreme court of the Territory of Arizona, upon said petition, duly made and had entered of record in said court an order allowing a writ of error in said action in favor of said Southern Pacific Company, plaintiff in error, from said judgment to the Supreme Court of the United States, and in said order also fixed the amount of the security which the said above-bounden principal should be required to give pending the determination of said cause in said Supreme Court of the United States and to stay execution herein in the sum of (40,000) forty thousand dollars:

Now, the condition of this obligation is such that if the said Southern Pacific Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

[Seal S. P. Co.]

SOUTHERN PACIFIC COMPANY,
By G. L. LANSING, *Secretary.*
CHARLES F. CROCKER, *Surety.*
A. N. TOWNE, *Surety.*

258 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles F. Crocker and A. N. Towne, being duly and severally sworn, each for himself and not one for the other says:

I am one of the sureties upon the above undertaking and reside in the city of San Francisco, State of California, and am a householder therein. I am worth the sum of forty thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution, in property situate in said city and county of San Francisco, State of California.

CHARLES F. CROCKER.
A. N. TOWNE.

Subscribed and sworn to before me this 3rd day of May, 1893.

[SEAL.]

E. B. RYAN,
Notary Public.

The above bond upon writ of error is hereby approved and execution stayed pending the determination of said writ.

Dated this 12th day of May, 1893.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona Territory.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson, defendant in error. Bond on writ of error. Filed May 12, 1893. T. D. Hammond, clerk.

259 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Bertha Tomlinson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 13th day of July, 1893, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Arizona, wherein The Southern Pacific Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Gooding, chief justice of the supreme court of the Territory of Arizona, this 12th day of May, A. D. 1893.

HENRY C. GOODING,
Chief Justice of the Supreme Court of the Territory — Arizona.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson, defendant in error. Citation. Service of a copy hereof accepted May 12, 1893. Baker & Campbell, attorneys for plaintiff. Filed May 12, 1893. T. D. Hammond, clerk.

260 *Return to Writ of Error.*

The answer of the judges of the supreme court of the Territory of Arizona to the foregoing writ of error.

The record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the honorable the Supreme Court of the United States, within mentioned, at the day and place within named in a certain schedule to this writ annexed, as within we are commanded by the court.

[SEAL.] T. D. HAMMOND,
Clerk of the Supreme Court of the Territory of Arizona.

(Endorsed:) In the supreme court of the Territory of Arizona. Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson, defendant in error. Return to writ of error. Filed May 12, 1893. T. D. Hammond, clerk.

261 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Territory of Arizona, } *ss.*:

I, T. D. Hammond, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 260, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Southern Pacific Company, plaintiff in error, against Bertha Tomlinson, defendant in error, as the same remain of record and on file in said office; also that the citation, writ of error, and return to writ of error attached hereunto are the original citation, writ of error, and return to writ of error issued by said supreme court of the Territory of Arizona.

In witness whereof I have caused the seal of the supreme court of the Territory of Arizona to be hereunto affixed, at the city of Phœnix, in the Territory of Arizona, this 23rd day of June, 1893.

[Seal Supreme Court of Arizona.]

T. D. HAMMOND,
Clerk of the Supreme Court of the Territory of Arizona.

Endorsed on cover: Case No. 15,351. Arizona Territory supreme court. Term No., 967. The Southern Pacific Company, plaintiff in error, *vs.* Bertha Tomlinson. Filed July 14, 1893.

NOV 9 1893
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

BERTHA TOMLINSON.

No. 967.

In Error to the Supreme Court of the Territory of Arizona.

Motion of the Defendant in Error to Dismiss, or Affirm, and Brief on such Motion.

Comes the defendant in error and moves the court to dismiss the writ of error herein, as the court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

A. H. GARLAND,
For Defendant.

BRIEF.

The defendant in error brought suit for herself and others, in a district court in Arizona, against the plaintiff in error to recover damages for the killing of Thomas

Tomlinson. She claimed damages for herself as the widow of Thomas Tomlinson, and for his children, several in number, and also for his father and mother, under Secs. 2149–2150, Rev. Stats. Arizona, 1887. (Rec., 1, etc.)

The company appeared and pleaded contributory negligence, and this was the only issue in the trial. (Rec., 2–3, etc.) A full trial was had and resulted in a verdict for Mrs. Tomlinson of $50,000, and assessed in portions to each party for whose benefit the suit was brought. (Rec., 4.)

The court was asked by the company to give this instruction to the jury:

The evidence in this case shows that Thomas Tomlinson, plaintiff's intestate, who was killed by the train, did not use ordinary care in crossing the railroad track of defendant, and under the law is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant.

which the court refused to give, and the company excepted (Rec., 5–6), and this appears to be the only exception reserved at the trial. A motion for a new trial was filed in usual form, and pending that counsel for Mrs. Tomlinson voluntarily offered to remit, in stated portions of each assessment, the total sum of $31,998, leaving the verdict for only $18,002, and this the court allowed, and overruled the motion for a new trial, and entered judgment for the $18,002; and to this the company excepted, and carried the case to the Supreme Court of the Territory, and it was there affirmed (Rec., 6–7, etc.), and the company sued out this writ of error.

The question that went to the Supreme Court of the Territory was, whether the court below (district court) erred in overruling the motion for a new trial, and that court said there was no error in this, and affirmed the judgment of the district court. Manifestly, then, there is no other question here except that of overruling the motion for a new trial. It may now almost be called

antiquated law here, that this question is not reviewable in this court, and no controversy exists as to it since *Warner* v. *Norton*, 20 *How.*, *448*. See, too—

Newcomb v. *Wood*, *97 U. S.*, *581*;
Railroad Co. v. *Fraloff*, *100 Ib.*, *31–2*;
Missouri, *&c.*, v. *Chicago*, *&c.*, *132 Ib.*, *191*.

And this court will not review a case to see, after a trial had on the facts, if the jury decided on the facts properly; that is the province of the jury and not of this court. (Cases *sup.*)

The jury had all the facts before it, and rendered their verdict, and with any evidence to support it, the matter is at an end here.

But this all aside, suppose there was no motion for a new trial, and plaintiff in error stood here upon the instruction asked, what would be the result? The proposition upon its face is so destitute of merit it seems almost trifling with the court to have asked it, for—

1st. After an explanation by the court as to what constitutes contributory negligence, the jury and not the court must judge whether the facts offered in proof make out the assertion; therefore, the court could not take the fact from the jury and tell them it existed and they must find for the defendant. This is clear beyond all doubt, even outside of the general doctrine that will not permit courts to instruct juries absolutely to find for a certain party. It requires a case positively without support on the other side to justify this.

Texas, *&c.*, v. *Cox*, *145 U. S.*, *596*;
U. S. v. *Chidester*, *140 Ib.*, *49*.

But here was an assertion of a matter of fact in defense, and the burden of proof was on the party asserting it, and this party gave no testimony at all to make it good.

It is evident, then, the instruction was without support; was frivolous, and could not for one moment be entertained by the court.

1 Greenl. Ev. (14 ed.), 49, and notes.

But we are not forced to rely upon the general rule governing such matters, for it is expressly ruled by this court and other courts, the very defense interposed in this case as to contributory negligence must be made out by the party pleading it, otherwise due care and caution on the part of the plaintiff will be presumed.

St. Louis, &c., v. *Horst, 93 U. S., 291;*
Railroad, &c., v. *Gladmon, 15 Wall, 401.*

And such has been directly held in Arizona.

Lopez v. *Central, &c., 1 Ariz., 464.*

See also *Gay* v. *Winter, 34 Cal., 153;*
Johnson v. *Hudson, &c., 5 Duer (N. Y.), 21;*
Button v. *Hudson, &c., 18 N. Y., 248.*

The court, however, will observe, the main point of objection on the part of the company was the excessive damages awarded. Mrs. Tomlinson remitted, without any order or direction of the court, nearly two-thirds of the amount awarded by the verdict. This she could do, and it was entirely within the discretion of the trial court to allow this, and it is not reviewable in a higher or appellate court; indeed, courts favor remittiturs.

Central, &c., v. *Crosby, 74 Geo., 737;*
Howard v. *Grover, 28 Me., 97;*
3 Gra. & Wat., 1162, 1165, and notes.

And equally explicit on this question has this court ruled.

Arkansas, &c., v. *Mann, 130 U. S., 69–74;*
Hopkins v. *Orr, 124 Ib., 510;*
Northern, &c., v. *Herbert, 116 Ib., 642.*

The case cited in *130 U. S., sup.*, exhausts this whole subject in all its length and breadth, and it says too (pp. 75–6) that this is not a matter to be reviewed by this court.

It seems idle to talk of the widow not having the power to remit for the others for whose benefit the suit is brought. The section of the statute giving her the right to bring the suit (sec. 2150) would be useless if she, bringing this suit had not full power, as other plaintiffs, to do all things needful to carry the suit to an end—in other words, to control it. It would be folly to construe the statute as merely authorizing her to *bring* the suit and there stop, and such would be the effect in construing it to deny her the right to remit. The opinion of the Supreme Court of the Territory (Rec., 122) sufficiently disposes of this.

But all this is a part of remitting, which we have seen courts favor, and which is within the discretion of the trial court, and it is not reviewable here. This is a stronger case on this point than the case in *130 U. S., sup.*, as there the trial court made it a condition in overruling the motion for a new trial, that the plaintiff should remit an amount named by the court, but here the plaintiff voluntarily remitted, and then the court overruled the motion for a new trial. In other words, after a protracted and thorough trial the defendant complains that plaintiff gave up in its favor nearly two-thirds of a verdict found by the jury. The plaintiff in error complains that Mrs. Tomlinson did not take a judgment for $50,000 instead of $18,002—a curious complaint. Surely upon the Record there is no question presented in this for review here.

Then this court is asked to review the action of the court below in passing upon and overruling a motion for a new trial, which we have seen can not be done.

And then it is asked to review the action of the court

Besides this is a question of Territorial practice ich court cannot control. Hornbuckle v. Toombs, 18 Wall. 6; B v. Thompson, 138 U.S. 123.

below in allowing a remittitur to be entered by plaintiff, which we have seen is a matter in the discretion of the trial court and can not be examined here.

Then it is clear the case should be dismissed.

But if there is the least color of jurisdiction to enable this court to pass on these questions, it is apparent they are frivolous to the utmost, and no argument can be needed to show this, and an affirmance of the judgment should be granted.

Respectfully,

A. H. GARLAND,
For Defendant.

WASHINGTON, D. C., *October 19th, 1893.*

J. HUBLEY ASHTON, Esq.,
Washington, D. C.,

Attorney of Record in the Supreme Court of the United States for the Southern Pacific Co., in the case therein pending, No. 967, of the Southern Pacific Co. *v.* Bertha Tomlinson.

You are hereby notified that the defendant in error in the above-named cause will, on Monday, the ~~thir-~~ twentieth ~~teenth (13th)~~ 20th day of November next (1893), on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion and papers.

Very respectfully,

A. H. GARLAND,
For Defendant in Error.

NOV 20 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1893.—No. 967.

THE SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

BERTHA TOMLINSON.

In Error to the Supreme Court of the Territory of Arizona.

Brief for the Plaintiff in Error in Opposition to the Motion to Dismiss or Affirm.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
Counsel for Plaintiff in Error.

Press of McGILL & WALLACE, 1107 E Street N. W.

Supreme Court of the United States.

October Term, 1893. No. 967.

THE SOUTHERN PACIFIC COMPANY,
PLAINTIFF IN ERROR,

vs.

BERTHA TOMLINSON.

In Error to the Supreme Court of the Territory of Arizona.

Brief for the Plaintiff in Error in Opposition to the Motion to Dismiss or Affirm.

STATEMENT.

This is a motion by the defendant in error to dismiss the writ of error herein for want of jurisdiction, or to affirm the judgment below, under Subdivision 5 of Rule 6 of this Court.

This Court has unquestionable jurisdiction to review the judgment brought before it by the present writ of error, and there is no ground or color whatever for the motion which has been made to dismiss the writ for want of jurisdiction.

The writ of error is to a judgment of the Supreme Court of the Territory of Arizona, rendered on April

14, 1893, affirming a judgment of the District Court of the Second Judicial District of Arizona in and for the County of Penal, entered on June 11, 1892, in favor of Bertha Tomlinson and others, against the Southern Pacific Company, for the sum of $18,002, with interest, and costs, in an action at law instituted by the plaintiff for the benefit of herself and others, against the defendant Company, under the provisions of Title XXXVI of the Revised Statutes of Arizona, 1887, entitled "*Injuries resulting in death.*"

The District Court, at the trial and in the progress of the cause, made certain rulings, which were the subject of exceptions on the part of the defendant, and were duly embodied in a formal bill of exceptions, allowed and signed and ordered to be made a part of the record by the Judge of that Court, and upon such bill of exceptions the judgment of the District Court was reviewed and affirmed by the Supreme Court of the Territory.

It is for this Court, therefore, to review the final judgment of the Supreme Court of the Territory through rulings of that Court upon the questions presented by the bill of exceptions, and to examine into any alleged errors committed by that Court, on the appeal taken to it from the District Court, disclosed by the present record.

There can be no question, therefore, as we respectfully submit, in regard to the jurisdiction of this Court to revise, upon the present writ of error, the final judgment of the Supreme Court of the Territory of Arizona, in this cause, and that the motion to dismiss the writ is improvidently made, and does not warrant the motion to affirm the judgment.

A particular statement of the case is this:

The Revised Statutes of Arizona provide (sec. *2145*)

that "an action for actual damages on account of injuries causing the death of any person may be brought ..... when his death is caused by the wrongful act, negligence, carelessness, unskillfulness, or default of another;" but, "the wrongful act, negligence, carelessness, unskillfulness, or default must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for the injury."

The Statutes further provide:

"*Sec. 2149.* The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"*Sec. 2150.* The action may be brought by all the parties entitled thereto, or by one or more of them for the benefit of all.

"*Sec. 2151.* If the parties entitled to the benefit of the action shall fail to commence the same within six months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

"*Sec. 2152.* The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled.

"*Sec. 2153.* If the sole plaintiff dies pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

"*Sec. 2155.* The jury may give such damages as they think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the parties entitled to the benefit of the action,

or such of them as shall then be alive, IN SUCH SHARES AS THE JURY SHALL FIND BY THEIR VERDICT."

Revised Statutes, Arizona, 1887, Title XXXVI, Injuries Resulting in Death.

On October 21, 1891, Bertha Tomlinson, as the surviving wife of one Thomas Tomlinson, deceased, brought an action in the District Court of the Second Judicial District of Arizona, against the Southern Pacific Company, for the benefit of herself, as the surviving wife, as well as for the benefit of the children and parents, of the deceased, named in the complaint, to recover damages to the amount of $50,000 sustained by them by the death of the deceased, which occurred, as averred, by the negligence of the defendant.

The complaint alleged that Tomlinson, on June 24, 1891, at the town of Casa Grande, while crossing the track of defendant's railroad, was struck and killed by a passing train of the Company.

The defence was, that the deceased, wantonly and recklessly, attempted to cross or placed himself on the track of defendant's railroad at no regular crossing, but on the private right of way and on no public highway, and that the accident was not caused by any fault or negligence of the defendant, but was caused by the willful negligence and want of ordinary care and caution of the deceased.

On June 7, 1892, the jury found a verdict for the plaintiff, and assessed the damages in the sum of $50,000, and apportioned the amount among the beneficiaries named in the complaint, as provided in section *2155* of the Revised Statutes. (Rec., p. 4.)

On June 8, 1892, the defendant filed a motion for a new trial, as follows:

"Now comes the defendant and moves the Court to set aside the verdict, and grant a new trial of this cause on the following grounds, viz.:

"*First.* Errors of law committed by the Court during the progress of the trial, which will be fully set forth in the statement of facts and bill of exceptions to be filed and settled.

"*Second.* That the evidence is insufficient to support the verdict.

"*Third.* That the verdict is against the law.

"*Fourth.* That the verdict is against the law and the evidence.

"*Fifth.* That the damages assessed by the jury in their verdict is excessive, unsupported by the evidence, and were given under the influence of passion and prejudice.

"This motion is based upon the minutes of the Court, record of the case, and statement of facts and bill of exceptions to be hereafter filed." (Rec., p. 6.)

After the filing of this motion, the plaintiff filed and the Court allowed a certain so-called *remittitur*, remitting from the amounts of the verdict returned by the jury in her favor, and in favor of the other beneficiaries in the action, certain sums, amounting in all to $31,998, and allowing the whole verdict to stand at $18,002.

This *remittitur* is set forth in the bill of exceptions in the record.

Thereupon, the District Court heard and overruled the motion for a new trial.

To the ruling of the District Court the defendant then and there *excepted*, and the exception was allowed by the Court.

Whereupon the Court ordered that the plaintiff have judgment against the defendant for the sum of $18,002, apportioned according to the allowances in the said *remittitur*.

From which judgment, and order overruling the motion for a new trial, the defendant appealed to the Supreme Court of the Territory. (Rec., p. 7.)

The judgment of the District Court, as entered on June 11, 1892, ordered and decreed that the said plain-

tiff have and recover from the defendant, $18,002, with interest at the rate of seven per cent. until paid, for the benefit of the persons named, and in the sums mentioned, which were the sums set opposite the names of those persons respectively in the *remittitur* filed by the plaintiff.

The judgment of the District Court, as rendered, was thus in no sense a judgment *on the verdict*, but was a judgment on the so-called *remittitur*, regardless of the verdict of the jury.

It will be submitted that if there ever was a case in which a party having an excessive and outrageous verdict, unquestionably secured through the prejudice, passion, or total misconception of the jury, had no right to alter the verdict, pending a motion for a new trial, and thereby effectually deprive the defendant of his right to and the benefit of the unbiased judgment of the Court upon the merits of that motion, *this is that case.*

On June 11, 1892, a bill of exceptions was signed by the Judge of the District Court, who ordered that the same be filed, and made a part of the record of the case, agreeably to the provisions of the Revised Statutes of Arizona. (Rec., p. 8.)

By those statutes, as will be seen, after the trial of a cause, a party may make out a written *statement of the facts* in evidence on the trial, and submit the same to the opposite party and the Court for approval, and when the statement of facts contains all the evidence requisite to explain the bill of exceptions, it is unnecessary to set out the evidence in the bill. (Rev. Stats., Arizona, secs. 825, 843).

When the bill of exceptions was settled, in this case, the Court allowed the defendant the statutory time for filing its statement of facts. (Rec., p. 8).

Such a statement was prepared and approved, and is in the record, and it contains all the evidence requisite to explain the bill of exceptions, as well as all the proceedings had in the action up to rendering judgment. (Rec., pp. 14–116).

It may be also mentioned, in this connection, that by the statutes of Arizona, an order overruling a *motion for a new trial* is the subject of an exception, which may be embodied in a bill of exceptions for the review of the Supreme Court of the Territory. (Revised Stats., sec. 842.)

It appears by the bill of exceptions that after the plaintiff had introduced all her testimony and rested the case, the defendant asked the Court to give the following instruction to the jury:

Instruction asked by defendant at the close of plaintiff's evidence, requested on the ground that the evidence shows conclusively that plaintiff's intestate (Tomlinson), was grossly negligent in attempting to cross the track with an approaching train in full view.

INSTRUCTION.

"The evidence in this case shows that Thomas Tomlinson (plaintiff's intestate), who was killed by the train, did not use ordinary care in crossing the railroad track of the defendant, and under the law the plaintiff is not entitled to a verdict for the injury done. You are therefore instructed to find for the defendant."

The instruction prayed was refused by the Court, and to that ruling the defendant then and there duly excepted.

The verdict rendered by the jury, on June 7, 1892, as set forth in the bill of exceptions, was as follows:

"We, the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff, and assess damages against defendant in the sum of $50,000, *to be divided as follows:*

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

The bill of exceptions states that, on June 8, 1892, the defendant filed a motion to set aside the verdict, and grant a new trial, for the reasons therein set forth. (Record, p. 6.)

On June 10, 1892, the plaintiff, in open court, made and filed and offered a *remittitur*, as follows:

"Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict heretofore rendered herein in the sum of $50,000, the following sums:

Bertha Tomlinson	$8,000	remitted to	$6,000
Alice Tomlinson	8,000	" "	3,000
Fenton Tomlinson	8,000	" "	3,000
Howard Tomlinson	8,000	" "	3,000
Baby Tomlinson	8,000	" "	3,000
Fenton Tomlinson (father)	5,000	" "	1
Mary Tomlinson (mother)	5,000	" "	1

thereby making a total remittance of $31,998, and allowing the verdict to stand in the sum of $18,002."

Defendant objected to the remittance being allowed; whereupon the Court sustained the remittance, overruled the motion for a new trial, and ordered judgment for the sum of $18,002, to which the defendant then and there duly excepted, and time was given during the continuance of this term of the Court to prepare and file a bill of exceptions thereto. (Bill of Exceptions, Record, pp. 8–9.)

The District Court, on June 11, 1892, as stated, entered a judgment against the defendant, the Southern

Pacific Company, for $18,002, with interest, for the benefit of the persons named in the complaint, and *as by the remittitur apportioned among the parties.* (Record, pp. 10, 11).

The judgment was:

"Wherefore by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that the said plaintiff do have and recover from the Southern Pacific Company the sum of $18,002, with interest thereon from the date hereof at the rate of seven per cent. per annum until paid, for the benefit of the persons hereinafter named, in the sums following, to wit:

Bertha Tomlinson, plaintiff	$6,000
Alice Tomlinson, *child*	3,000
Fenton Tomlinson, *child*	3,000
Howard Tomlinson, *child*	3,000
Baby Tomlinson, *child*	3,000
Fenton Tomlinson, *father*	1
Mary Tomlinson, *mother*	1

And it is further adjudged that the plaintiff do have and recover of and from the defendant her costs and disbursements incurred in this action, amounting to the sum of $978.55."

The Supreme Court of Arizona affirmed this judgment, and rendered judgment accordingly for the sum of $18,002, with interest from June 11, 1882, at the rate of seven per cent. per annum, together with the costs in the District Court taxed at $978.55, and costs on appeal.

The Chief Justice of the Territorial Supreme Court allowed the defendant the present writ of error for the review of that judgment by this Court.

The opinion of the Supreme Court, by Sloan, J., is in the record, and it shows that the Court considered and disposed of the case on appeal to it upon two questions: *first*, the question as to the legality of the action

of the District Court in allowing the remittitur and entering judgment for the parties in interest in accordance therewith ; and, *second*, the ruling of the District Court upon the request of the defendant for an instruction to the jury to render a verdict for the defendant upon the evidence introduced by the plaintiff. (Record, pp. 120–124.)

Upon the first question, the Court said :

"It is alleged by appellant that the Court erred in allowing the remittitur and entering judgment in accordance therewith, first, for the reason that the plaintiff had no *power* to remit any portion of the damages awarded by the jury, except, perhaps, the portion allowed to *her* by the verdict ; and, second, for the reason that the damages being excessive, it was evident that the jury in returning any verdict for the plaintiff, acted through passion or prejudice, and, therefore, a remittitur could not possibly operate to cure the verdict thus wrongfully found."

The Court then said :

"As to the right of the *nominal plaintiff* in an action for damages on account of injuries causing death, we are not cited to any authorities directly in point. Independently of the statute, the right to maintain such an action does not exist. *We are, therefore, left to determine this question solely to a consideration of the sections of the statutes which bear upon the question* * * * The paragraph last quoted (section 2150) gives the widow authority to bring suit for herself, children, and parents of the deceased. The authority to bring it, *it seems to us*, includes also full authority to prosecute, control, and direct the suit to its final determination.

"If to *prevent a new trial being granted*, it be necessary to remit a portion of the damages, we see no reason why she may not, under the statute, remit such *portion or portions as may be necessary to that end, and which she may consider in good conscience ought to be remitted.*"

The Court further said on this most important question:

"While the record does not affirmatively show that the trial Court made a remission of a portion of the damages awarded, a *condition precedent to his overruling the motion for a new trial, the damages awarded being clearly excessive*, we think it quite evident *that had the remittitur not been filed the Court would have granted the motion.*"

The Court further said:

"Of course, if it is apparent to the trial Court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside;" and,

"We rather incline to the view that the jury, having found the issues in favor of the plaintiff, *was then prompted, through sympathy for the widow* and *children and out of the enlarged liberality of which juries in such cases are usually possessed* to award damages *largely in excess of what the proofs warranted.*"

It would clearly seem from this view, to which the learned Court inclined, that it was its duty, under the law, to reverse the judgment, and grant a new trial of the case by jury.

If "*sympathy for the widow and children*," leading to that "*enlarged liberality of which juries in such cases are usually possessed*," expressed by a verdict "*largely in excess of what the proofs warranted*," is not "prejudice," which vitiates a verdict, rendering it unfit to be the basis of a judgment of any kind, it would be difficult to characterize it for legal purposes.

The second question considered by the Court below, as stated, was upon the refusal of the trial Court at the close of plaintiff's case to direct the jury to return a verdict for the defendant at the request of defendant,

and the Court concluded that the trial Judge properly denied that request upon the evidence.

Under the Statutes of Arizona, the question of contributory negligence in law, on the part of the deceased, was properly presented by the request for the instruction asked at the close of the plaintiff's testimony, and was brought before the Supreme Court, by the bill of exceptions, as the Court, in effect, held, and the ruling of the Court thereon is properly the subject of review by this tribunal under the writ of error.

An examination of the opinion of the Court below shows that the Court failed to consider, as it was bound to consider, on the appeal taken, the questions specifically presented by the motion for a new trial made by the defendant.

The action of the District Court in overruling that motion, was the subject of an exception, under the Statutes of Arizona, and was before the Supreme Court upon the bill of exceptions in the case, and the record shows that the defendant expressly assigned for error, on the appeal, that *the District Court erred in overruling the motion for a new trial.* (Rec., p. 117.)

Whether or not the remission, as filed, was legal and valid, and notwithstanding such remission, it was the duty of the District Court, and of the Supreme Court, of the Territory, on appeal, to consider whether or not the plaintiff was entitled to a verdict at all in any sum, and whether or not the defendant was entitled to have a new trial of the whole case.

If that duty was not performed by the Court below, its judgment for the plaintiffs, in any view of the case, would have to be reversed by this tribunal.

Argument.

First.

As has been said, in the course of the preceding statement, there is no ground or color for the motion to dismiss the writ of error for want of jurisdiction, and the motion to affirm the judgment below, therefore, will not be considered by the learned Court, under the settled interpretation of Subdivision 5 of Rule 6.

1. The case is one of trial by jury, and there is and can be no question that this Court has appellate jurisdiction to review the judgment of the Court below by writ of error.

By the Revised Statutes of the United States, Sec. 1869, it is provided that "writs of error, bills of exceptions, and appeals shall be allowed, in all cases, from the final decisions of the District Courts to the Supreme Court of all the Territories respectively under such regulations as may be prescribed by law."

And by Sec. 1909, and the act of March 3, 1885, ch. 355, writs of error are expressly allowed to this Court from the final decisions of the Supreme Court of Arizona, in cases at law, where the matter in dispute exceeds the sum of five thousand dollars.

The Court has before it, in the record, a bill of exceptions, and a statement of facts, under the Revised Statutes of Arizona, upon which the judgment of the District Court was reviewed by the Supreme Court of the Territory, and it is for this Court to examine into the errors alleged to have been committed by that Court in affirming the judgment rendered against the plaintiff in error by the District Court. The rulings of the Supreme Court of the Territory upon the important questions presented in the bill of exceptions and accom-

panying statement of facts, under the laws of Arizona, and on which the judgment against the plaintiff in error for this large sum of money depended, are the proper subjects of review by this appellate tribunal.

The Revised Statutes of Arizona, section *823*, provide that "whenever in the progress of a cause either party is dissatisfied with any ruling, opinion, or other action of the Court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill."

Those Statutes further provide:

"*Sec. 826.* The ruling or other action of the court in the giving, refusing or granting of instructions to the jury shall be regarded as excepted to in all cases.

"*Sec. 842.* When a motion for a new trial is overruled the party who files the motion may except to such ruling, and embody the same in a bill of exceptions, as is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, and the Supreme Court shall review such ruling on appeal or writ of error."

The Revised Statutes of the Territory of Arizona provide further for a *statement of facts*, which, in a sense, is supplementary to the bill of exceptions in the case in which such a statement is prepared and filed. (Rev. Stats., Arizona, 1887, sections 825, 843, 845).

Section *825* provides that "when the *statement of facts* contains all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts."

And section *845* provides that "the court may by an order entered upon the record during the term author-

ize the statement to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The record shows that when the bill of exceptions was signed and ordered to be made a part of the record of the cause, by the Judge of the District Court, the defendant was allowed time to prepare and file its statement of facts, and that such statement was made and agreed to and approved by the attorneys for the plaintiff, and by the Judge of the Court, as a correct statement of substantially all the evidence on the trial, and all proceedings had from the verdict to the rendering of judgment. (Rec., pp. 14-116.)

It is therefore clear that the judgment in this case is not the proper subject of a motion for affirmance under the rule as interpreted in numerous decisions of this Court. There is no color of right to a dismissal of the writ of error, and in such a case a motion to affirm will not be entertained. It is not asserted in the motion of the learned counsel for the defendant in error that the writ of error was taken for delay, as it certainly was not, and it is quite manifest that the questions arising upon the record are in no sense frivolous. If a motion to affirm is competent in the present case, it is difficult to see why the defendant in error in every case upon the docket might not with equal propriety make a similar application under a motion to dismiss for alleged want of jurisdiction.

2. The record shows that the defendant's motion for a new trial was based upon the record, the statement of facts, and the bill of exceptions, to be thereafter filed; that the defendant took, as it was entitled to take, an exception to the action of the District Court in sustaining the remission, overruling the motion for a new trial, and

ordering judgment for the sum of $18,002; and that the defendant appealed from both the judgment and the order overruling the motion for a new trial to the Supreme Court of the Territory.

The exception to the order of the District Court overruling the motion for a new trial, upon the record, as made up, under the statutes, was properly embodied in the bill of exceptions as afterwards settled by the Court, and it was for the Supreme Court to review the ruling of the District Court in refusing the defendant a new trial upon all the grounds stated in the motion, and to grant a new trial if it appeared to it that the defendant was entitled to have a new trial of the whole case. (Sec. 842, Revised Statutes of Arizona, *supra*.)

It was the unquestionable duty of the Supreme Court of the Territory, as it was the duty of the District Court, to determine whether the plaintiff was entitled to a verdict in *any* sum, independently of any question as to the right of the plaintiff, pending the motion for a new trial, to enter a remission of a part of the verdict, and notwithstanding the remission as offered and filed.

In the opinion of the Court below, assigning the grounds for its judgment, which is sent up with the record as required by the rules of this Court, the Court, as before stated, confined its attention to the question of the power of the nominal plaintiff to remit, and the character and cause of this excessive verdict, and while technically overruling, apparently, the motion for a new trial, gave no attention to the primary question before it, as to whether or not the plaintiff, upon the evidence before the jury, was entitled to a verdict in any sum.

It is unquestionably competent for this Court upon the writ of error to determine whether the Court below suitably and justly exercised its power, according to law, in disposing of the motion for a new trial, brought

before it by the appeal, and if not, to reverse the judgment, and remand the case for such further proceedings as may be proper.

Kennon *v.* Gilmer, 131 U. S., 22–30;
Met. R. R. Co. *v.* Moore, 121 U. S., 558.

3. There can be no just suggestion of doubt in regard to the jurisdiction and authority of this tribunal to review the judgment below upon the decision of the Court sustaining the action of the District Court in allowing the nominal plaintiff, in this action, against the objection of the defendant, to enter the remission, in the record, and rendering judgment in accordance with its terms.

The question of the legality and validity of the action of the District Court, and of the judgment rendered by it against the defendant upon the remittitur, is preserved in the bill of exceptions, was considered and determined by the Supreme Court of the Territory, and is before this Court upon the present writ of error.

The importance of the question will be at once perceived.

It is not a question which has ever been before this Court, either in its general character, or in the particular aspect in which it arises here in connection with the Arizona Statute under which this action was brought.

It will be submitted to the learned Court that upon the principles adjudged by it in the cases of *Arkansas Cattle Co.* v. *Mann* (130 U. S., 69), and *Kennon* v. *Gilmer* (131 U. S., 22), that it was not competent for the District Court to entertain the remission interposed by the plaintiff, and upon the faith of it to summarily overrule the motion for a new trial, and render a judgment for the amounts which the plaintiff chose to allow the parties for whose benefit the action was brought under the Arizona Statute, and that the

judgment as thus entered in effect upon the remission, and not upon or according to the verdict, was erroneously and illegally rendered against the defendant, and should have been set aside by the Supreme Court of the Territory, and that the judgment below should be reversed by this tribunal.

It is not necessary to read the record "between the lines" to perceive, but it is patent upon the face of the record, that the Court allowed the plaintiff and her attorneys to put themselves in the place of the jury, and upon some theory of their own to fix amounts for the parties in interest, which commended themselves to *their* judgment as within the bounds of reason, upon their plain admission in effect that the jury had been carried away by passion, prejudice, or a perverse disregard of justice.

It was not in the power of the District Court to allow the plaintiff and her representatives this liberty, consistently with the constitutional right of trial by jury, without a waiver by the defendant of a verdict by a jury.

The bill of exceptions shows that the defendant expressly objected to the remittance being allowed, and that notwithstanding this objection the judgment complained of was rendered.

The unwarranted course of the District Court, in this case, was a plain violation of the second clause of the Seventh Amendment of the Constitution, and a direct infringement of the rights guaranteed to the plaintiff in error by the Constitution; and for that reason, if no other, as we shall respectfully maintain, the judgment should have been set aside by the Court below.

4. The defendant excepted at the close of the plaintiff's case to the refusal of the Court to direct a verdict for the defendant, upon the ground that the plaintiff's

evidence showed affirmatively that the deceased was guilty of contributory negligence, and the exception is incorporated in the bill of exceptions in the record.

As has been seen, the question as to whether or not the plaintiff had exculpated the defendant by showing that as matter of fact and law the deceased was guilty of contributory negligence in attempting to cross the track of the defendant's road at the time and in the manner he did, and whether or not the defendant was entitled to a verdict upon the legal effect of the plaintiff's testimony before the jury, was considered by the court below, agreeably to the law and practice in such cases in Arizona, and determined in the opinion of the Court, which has been transmitted here with the record in this case.

Of course, the plaintiff, in such an action, can not recover if the want of care or negligence, on the part of the deceased, in any degree, contributed to the result complained of; and there can be no just doubt, as we shall respectfully submit, in the present case, that the injury involved was caused not only by the act but the fault of the deceased, and this was shown affirmatively, as matter of law, in the first instance, by the testimony on the part of the plaintiff.

It appears to be well settled in the law of Arizona that if the evidence on the part of the plaintiff, in support of the issues joined, shows contributory negligence on the part of the deceased, the plaintiff can not recover; that in such a case it is error for the Court to refuse to grant a motion by the defendant for a nonsuit; and that such a motion is not affected by the subsequent introduction of testimony by the defendant (Lopez *v.* Central Arizona Mining Co., 1 Arizona, 464; Opinion by Sloan, J., in the present case, Record, pp. 123, 124).

If the ruling of the Supreme Court of Arizona, in this case, affirming the decision of the District Court deny-

ing defendant's request that the jury be instructed to render a verdict for the defendant, was erroneous, as we will respectfully maintain it was, the judgment below, as we shall submit, should be reversed by this Court.

SECOND.

Proceeding to some considerations upon the merits, it is quite evident, in the first place, as has been observed, that in the view of the subject of the damages, taken by the Court below, in its opinion, it was the duty of the Court, upon the appeal, to reverse the judgment of the District Court, and grant a new trial of the case by jury.

1. The principle is well settled by judgments of this Court, and other Courts of high authority, that if it appears that the jury in rendering an excessive verdict were influenced by passion or prejudice, it becomes the duty of the Court to set aside the verdict as one not fit to be the basis of a judgment. (Arkansas Cattle Co. *v.* Mann, 130 U. S., 75; Stafford *v.* P. H. Company, 2 Cliff., 82.) Where such an influence appears to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct and the entire finding of the jury.

The Supreme Court of the Territory had before it the whole record, in this case, and upon the appeal from the judgment and the order overruling the motion for a new trial, it was bound to consider whether the verdict was the result of passion or prejudice on the part of the jury, and to deal with it according to its true character.

2. The opinion of the Court shows, as before stated, that the Court found, in effect, that the jury, in making their verdict, were governed by a feeling which was, in

every just legal sense, prejudice, if not passion, and which rendered it totally inadmissible that their verdict should stand as the legal basis of any further action of the Court.

The Court expressly said that in its opinion the jury was prompted through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages *largely in excess of what the proofs warranted.*

This was misconduct on the part of the jury.

As the Court found that the incentives mentioned prompted the verdict, it should have set aside the verdict, as unfit to be the basis of a judgment in the case.

The judgment of the District Court, therefore, should have been reversed, and a new trial granted, by the Court below.

THIRD.

It will be maintained, on the part of the plaintiff in error here, that the Court below should have reversed the judgment of the District Court, as rendered against the plaintiff in error upon and in accordance with the remittitur, as filed by the defendant in error, on the ground that the judgment, as rendered, was erroneous and illegal, as in violation of the constitutional right of the plaintiff in error to trial by jury in the suit.

1. The Constitution declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any courts of the United States than according to the rules of the common law."

This Article, as the Court has observed, is in full force in all the organized territories of the United States.

2. This Court has said, speaking by Mr. Justice Gray, that "the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may *order* that a new trial be had *unless* the plaintiff elects to remit a certain part of the verdict, and that, if it does so remit, judgment be entered for the rest. Hopkins *v.* Orr, 124 U. S., 510; Arkansas Cattle Co. *v.* Mann, 130 U. S., 69." (Kennon *v.* Gilmer, 131 U. S., 29.)

In the case cited, the Supreme Court of Montana entered an absolute judgment for a less sum than that assessed by the jury, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case; and this Court reversed the judgment below upon the ground that no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.

The action of the Court, in this case, is not within or protected by the rule, or the principle of the rule recognized by this Court in any of the cases cited in reference to the power of a court of common law, in adjudicating a motion for a new trial, to judicially determine what part of the verdict may stand as a proper estimate of the damages of the plaintiff, and to enter an order, in the disposition of the motion, that a new trial be had, unless the plaintiff elects to remit the rest of the verdict.

The doctrine requires that there shall be a judicial determination by the Court of the whole question upon the subject of the damages, and that the remission shall be entered in pursuance of the order of the Court on the motion for a new trial, ascertaining the amount for which judgment may properly be entered, and putting the plaintiff to his election to remit the rest of the verdict.

It would seem, in the present case, that the remititur, as it is called, was adjusted in some way by the attorneys of the plaintiff, and that when it was filed, the Court overruled the motion for a new trial, and rendered judgment for the amounts allowed the beneficiaries in the remittitur.

The judgment was in effect an absolute judgment according to the remittitur, without any order of the Court upon the subject of the damages, putting the plaintiff to the election of remitting part of the verdict as excessive, before rendering judgment for the rest.

The plaintiff, "on her own hook" (to use an expression of Chief Justice Jackson of Georgia, 74 Ga., 746), "wrote off" a part of the verdict, and after that was done, the Court overruled our motion for a new trial, as if the act of the plaintiff cured the outrage of the verdict, and gave a judgment as the plaintiff proposed.

The reduction was unauthorized as against the pending motion for a new trial, which impeached the verdict as illegal, excessive, and the result of passion and prejudice, and was a direct wrong to the defendant.

The Court had no right to take action upon the reduction, or to be influenced or affected by it, as it undoubtedly was, to the prejudice of the defendant; and the judgment, as rendered, was, as we shall respectfully submit, erroneous and illegal, and should be set aside through the action of this Court.

As said by Chief Justice Jackson of Georgia, "the uncertainty of life, the mere expectancy of its duration, the approach of age, the decline of strength, the hazards of so hard a life, the uncertainty of employment—all these and many more considerations—move a jury in estimating damages according to law, and no human being can tell what aliquot part is not supported by evidence, and ought to be written off." The plaintiff here undertook to solve this problem, but the Court had no right to register the decree.

FOURTH.

The next important question in regard to this remittitur for the determination of the Court, in this case, will be the question of the power and authority of the nominal plaintiff in the action, to remit portions of the damages awarded by the jury to the respective beneficiaries of the verdict, under the Arizona Statute.

1. The Court below, it would seem, found difficulty in disposing of this question, on account of the apparent absence of pertinent authorities upon the subject, but it finally concluded that to hold that the plaintiff in this action could not make such a remission, "would, we think, be construing the statute to place the plaintiff in this sort of action at a disadvantage to plaintiffs in other forms of action" (Rec., p. 122).

But this argument can not be deemed in any respect satisfactory; in fact, we shall submit that it is very clear upon the face, the principles, and the policy of the statute that such a nominal party is not authorized by law to alter or affect in any manner the verdict of the jury by which the damages have been divided among and apportioned to the respective beneficiaries of the action.

The language of the Arizona Statute, "damages proportioned to the injury resulting from such death," is the same as that of the English Statute, usually denominated Lord Campbell's Act, and the Statutes in force in many of the American States, and it has been often adjudged that, under such a Statute, all the surviving kindred related in the degrees designated are necessary parties to an action to enforce the remedy given by it, and that the claims and rights of all such persons must be before and taken into consideration by the jury when they estimate and apportion the damages by their verdict.

The Arizona Statute declares that "the action may be brought by all the parties entitled thereto, or by one or more of them *for the benefit of all*," and that "the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the *jury shall find by their verdict.*"

All the persons entitled to recover are substantial and real *plaintiffs* in the action, and they must be made parties by any nominal plaintiff instituting the suit.

It will be submitted, in the present case, that there can be no legal and valid judgment in a suit for damages, under this Statute of Arizona, except according to the verdict of a jury apportioning the damages among the parties entitled to the benefit of the action, and that an estimate and apportionment of damages can not be made by the Court, on a motion for a new trial by the defendant in such a suit, with or without the consent of the nominal plaintiff in the action.

The Arizona Statute, to be considered in the present case, appears to be identical with the provisions of the Revised Statutes of Texas, from which, indeed, the Arizona law seems to have been taken, and, under the

Texas Statute, it has been conclusively decided that all the surviving kindred related in the degrees designated are *parties plaintiff* in a suit to enforce the remedy, and are necessary parties; that if one thus related is not made a party, it is the duty of the Court to suspend the trial, and require such relative to be made a party; that it is no answer to an objection made for the want of necessary parties, that the claim of the unjoined beneficiary is barred by the statute of limitations; and that where a release has been executed by one or more of such kindred, such releasors should be made plaintiffs in the suit, so that their rights may be considered by the jury in estimating the damages.

Fort Worth, &c., R. R. *v.* Wilson, 22 S. W. R., 578;
Railway Co. *v.* Culberson, 68 Texas, 664;
D. & W. R. R. Co. *v.* Spiker, 59 Texas, 436;
March *v.* Walker, 48 Texas, 375;
Railway Co. *v.* Moore, 49 Texas, 45.

In the case first above cited, it was held that where in an action by the wife for the benefit of herself and child, it appeared that both parents of the deceased were living, the *release* by the parents of all claims by reason of the son's death constituted no defense to defendant's motion for a new trial, on the ground that the parents should have been made plaintiffs in the action.

It will be submitted, under the principles of these authorities, that it was not within the power of the nominal plaintiff here to make the remittitur which was executed by her, in this case, and which was made the basis of the judgment of the District Court, allowing damages in amounts which had no relation to the verdict of the jury.

2. It will be seen that four of the plaintiffs, in the present case, were *children* of the deceased, and that one of them, called "Baby Tomlinson," was a child seven months old; the other children, Alice, Fenton, and Howard, being respectively aged nine, seven, and five years (Rec., p. 71). Their respective damages were fixed by the plaintiff at $3,000 each, the jury having allowed them each $8,000, while the father and mother of the deceased were cut off each with *one dollar*, the jury having allowed them each $5,000 as damages.

It is clear that Mrs. Tomlinson had no color of legal right to remit any portion of the amounts awarded in the action to the children and parents of the deceased, and that the transaction in regard to the verdict after it was rendered was unauthorized by law.

Fifth.

It will be and is respectfully submitted that the Court below erred in sustaining the ruling of the District Court, at the trial, by which it refused to instruct the jury, at the close of the plaintiff's case, to return a verdict for the defendant.

1. As stated, the question upon the instruction asked by the defendant, after the plaintiff had put in her evidence, was specifically decided by the Supreme Court of the Territory, under the law and practice in Arizona, as shown by the opinion sent up with the Record, and the decision of that Court, affirming the ruling of the trial Court, upon its merits, is properly assigned as error in the present case on writ of error to the Supreme Court of that Territory.

The rule in Arizona is that if the jury would not be warranted in finding for the plaintiff at the close of his evidence, the defendant is entitled to a peremptory in-

struction to the jury to find for the defendant, and upon the refusal of such an instruction, to an exception which will preserve the question for an appellate court through the bill of exceptions provided by the Revised Statutes.

Under this rule, the defendant, in this case, at the close of the plaintiff's evidence, properly presented to the Court the question, in effect, whether it was competent for the jury to find that the deceased was in the exercise of due care and caution at the time of the accident, when he was attempting to cross the track of the defendant's railroad.

The trial Court decided the question in the affirmative, and the defendant excepted, and the exception is embodied in the bill of exceptions, and the question presented was passed upon by the Supreme Court of the Territory.

It is submitted that if the Court below erred in holding that the jury would have been warranted in finding for the plaintiff upon the question of due care on the part of the deceased, as raised by and at the close of the testimony for the plaintiff, the judgment below must be reversed.

It was conceded below that if the trial Court erred in disposing of the question of the effect of plaintiff's evidence in respect to the conduct of the deceased, at the time of the accident, the judgment of the District Court would have to be reversed and a new trial granted.

The question was regularly before the Court below, under the law of Arizona, and its determination is for the review of this tribunal.

2. It will be submitted that the undisputed facts in evidence, when the plaintiff closed her case, showed that the deceased was not in the exercise of due care at the time of the accident, and that it would have been incompetent for the jury to find a verdict against the

defendant from the testimony on the part of the plaintiff at the trial. If that view be correct, the trial Court should have taken the case from the jury at the conclusion of the plaintiff's evidence.

In order to recover for an injury on the ground of the negligence of another, it must appear that the injured party was in the exercise of due care in respect of the occurrence from which the injury arose; or that the injury was in no manner due to his own fault or want of care; in other words, that he was not guilty of contributory negligence.

The plaintiff could not have a verdict, if her evidence, in support of the issues joined, showed that the deceased was guilty of contributory negligence, or if all the facts and circumstances before the jury from that evidence pointed just as much to the negligence of the deceased as to the absence of it, or pointed in neither direction, for in neither case would the jury be entitled to find that the injury was in no manner due to his fault or want of care.

Railroad Co. *v.* Houston, 95 U. S., 697;
Schofield *v.* C. M. & St. P. R. Co., 114 U. S., 615;
Hinckley *v.* Cape Cod R. R., 120 Mass., 258;
Cordell *v.* N. Y. C. R. R., 75 N. Y., 330.

As was said in *Hinckley* v. *Cape Cod Railroad*, so it must be said here, it was *impossible* for the jury to find from the evidence offered by the plaintiff that the deceased exercised the care and circumspection properly to be demanded of one in his situation.

So, although it is held generally, in New York, that the presumption of due care is to prevail in doubtful cases, yet where all the circumstances in evidence pointed just as much to the negligence of the injured person as to the absence of it, or pointed in neither di-

rection, it was decided that the plaintiff should be nonsuited (Cordell *v.* New York Central, &c., R. R., *supra*).

The facts stated in the opinion of the Court below, on which it predicated its ruling, show, as matter of law, that there was *no* question for the jury upon the issue of contributory negligence, and that the Court was not authorized to submit the matter to the jury for determination.

3. The undisputed facts of the case, under all evidence, did not leave this issue as to the negligence of the deceased in any legal doubt, and the only reasonable and justifiable inference to be drawn from them was that the man came to his death by heedlessly endeavoring to rush across ahead of the advancing train, which he must have seen had he looked for it before attempting to cross the track.

The jury should have been instructed by the Court, therefore, to find a verdict for the defendant.

The deceased had resided for a long time in the immediate neighborhood of the spot where the accident occurred, and was perfectly familiar, as can not be doubted, with the crossing and the location of the objects near the track.

The train was observed by every witness for the plaintiff at a long distance, and the deceased could not have failed both to hear and to see the cars which were coming, had he used his senses.

The only legal conclusion warranted by the facts in evidence is that his death was caused by his own thoughtlessness or recklessness in exposing himself to danger on the railroad track from the approaching train.

In the leading case of the *Railroad Co. v. Houston* (95 U. S., 702), this Court, speaking by Mr. Justice

Field, said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the employes in those particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

The Court added that an instruction to render a verdict for the defendant would have been proper.

The doctrine of this case was reaffirmed and applied by this Court in *Schofield vs. Mil., Chicago and St. Paul Railway Company* (114, 115, 616), in which the opinion was delivered by Mr. Justice Blatchford, and is in accord with the current of decisions in the Courts of the States. (See, for late cases, R. R. Co. *v.* Riordan, 22 S. W. Rep,. 519; T. & P. Ry. Co. *v.* Nicholson, 22 S. W. Rep, 770; R. R. Co. *v.* Priest, 31 Pac. Rep., 674; McDonald *v.* R. R. Co., 22 S. W. Rep., 939.)

Under the settled law of this Court, there was no right of recovery by the plaintiffs against the defendant in this action, and there was plainly a miscarriage of law and justice in the Courts of the Territory.

SIXTH.

The Court below erred in not sustaining the motion for a new trial upon the grounds therein propounded, that the evidence was insufficient to support the verdict, and that the verdict was against the law, and against the law and the evidence.

The motion of the plaintiff in error for a new trial upon all the grounds therein set forth, was before the Supreme Court of the Territory upon the appeal taken to it from the District Court, and it was the duty of the Court below to specifically adjudge the questions presented by the motion under the bill of exceptions and statement of facts in the record.

The opinion sent up with the record shows the questions upon which the Court undertook to dispose the case, and render the judgment to which this writ of error is taken. It does not appear that attention was given to the vital and important questions presented by the motion for a new trial, which challenged the right of the plaintiff in the action to a verdict in any sum against the defendant, and which should have been sustained on the appeal by the Court below, as upon the undisputed facts of the case, and as matter of law, the deceased was to be adjudged guilty of contributory negligence.

It is respectfully submitted that the motion of the defendant in error to dismiss or affirm, should be denied.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
Counsel for Plaintiff in Error.

APR 22 1896
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 251.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

BERTHA TOMLINSON.

In Error to the Supreme Court of the Territory of Arizona.

BRIEF FOR THE PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
of Counsel for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.

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OCTOBER TERM, 1895 NO. 251.

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PLAINTIFF IN ERROR,

vs.

BERTHA TOMLINSON.

In Error to the Supreme Court of the Territory of Arizona.

Brief for the Plaintiff in Error.

Statement of the Case.

This is a writ of error to a judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of the Second Judicial District of Arizona in and for the County of Pinal, in an action brought by the defendant in error, Bertha Tomlinson, for the benefit of herself, as the "surviving wife" of one Thomas Tomlinson, deceased, as well as for the benefit of the children and parents of the deceased, against the Southern Pacific Company, to recover damages on account of the death of Thomas Tomlinson, alleged to

have been caused by the negligence of the defendant Company, and without any fault or negligence on the part of the said Tomlinson.

The action was brought in the Territorial District Court under the provisions of the Revised Statutes of Arizona, 1887, Title 36, "*Injuries Resulting in Death*," which are as follows:

"*2145*. An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases:

"1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, *or by the unfitness, gross negligence or carelessness of their servants or agents.*

"2. When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another.

"*2146*. The wrongful act, negligence, carelessness, unskillfulness, or default mentioned in the preceding section must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for injury.

"*2147*. When the death is caused by the willful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

"*2148*. The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amount in law as to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

"*2149*. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"*2150.* The action may be brought by all the parties entitled thereto, or by one or more of them for the benefit of all.

"*2151.* If the parties entitled to the benefit of the action shall fail to commence the same within six months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, *unless requested by all of the parties entitled thereto not to prosecute the same.*

"*2152.* The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled.

"*2153.* If the sole plaintiff dies pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

"*2155.* The jury may give such damages as they may think proportioned to the injury resulting from such death; and *the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive,* IN SUCH SHARES AS THE JURY SHALL FIND BY THEIR VERDICT."

Revised Statutes, Arizona, 1887, Title XXXVI,
Injuries Resulting in Death.

Bertha Tomlinson, in her complaint, in this action, alleged as follows:

That on June 24, 1891, the defendant, the Southern Pacific Company, was engaged in propelling cars for the conveyance of freight and passengers over a railroad which ran through the Town of Casa Grande, in the

feet or more long, left Tucson for Yuma. (*Ib.*, p. 88.) The distance between those places is 65 miles. The train reached the east portion of the Casa Grande station yard about 8.30 or 8.35 p. m., as stated by the conductor, engineer, fireman, and brakemen, who were witnesses for the defendant at the trial. (*Ib.*, 85–104.)

According to the testimony of those witnesses, the engineer whistled as usual for the station, about a mile from the depot, and shortly afterward for the crossing post, about half a mile from the depot. The first signal was one long whistle; the second, one long and two short whistles. The speed of the train was reduced, by the engineer, a mile and a half from the station, where the steam was shut off. The train was running about twelve miles an hour when it reached the tank house. The fireman began to ring the bell on the engine after the engineer whistled for the depot crossing, and before the train entered the station yard, and he continued to ring the bell until the train was stopped on account of this accident.

A short distance east of the depot crossing (the engineer said about 200 feet east of the crossing), both the engineer and fireman, standing in their proper places on the engine, saw a man step on the track, from the left or south side of the track; the engine struck the man, and he was thrown off the track. The train was instantly stopped by the engineer, and the injured man, who was Thomas Tomlinson, was found by the conductor lying on the ground between the main track and the north side track, about half way between the caboose and the engine.

The conductor sent a person to call an officer and a physician. He reported to the railroad office the fact that some one was injured, telegraphed a report to his superintendent, and rendered what assistance he could in the way of making the injured man comfortable by giving the ice he had on the caboose. (Rec., p. 86.) Mr. Tomlinson died before morning.

The only persons who witnessed the accident were the engineer and fireman, who were standing in their proper places, engaged in performing their proper duties, on the right-hand side and the left-hand side of the locomotive, respectively, at the time Tomlinson stepped upon the track, in front of the engine, from the south side of the track, and disappeared.

Mr. Tomlinson was on the private right of way of the defendant in its railroad yard at the time he was struck and injured by its cars. This right of way, as stated above, extended to a distance of one hundred feet from and on each side of the main track of the railroad. The deceased had no right to be there at night. The defendant was entitled to a free and clear track at the time and place of the accident.

The Verdict.

At the close of the evidence in the case, and after the charge of the court, the jury found a verdict for the plaintiff, and assessed damages against the defendant in the sum of **$50,000,** and apportioned the amount among the beneficiaries named in the complaint, as pro-

vided in paragraph 2155 of the Revised Statutes of Arizona (*supra*).

The verdict rendered by the jury, as set forth in the Bill of Exceptions, and the Statement of Facts, was as follows:

"We, the jury duly impanelled and sworn in the above-entitled action, find for the plaintiff, and assess damages against defendant in the sum of $50,000, *to be divided as follows:*

Bertha Tomlinson	$8,000
Fenton Tomlinson (father)	5,000
Mary Tomlinson (mother)	5,000
Alice Tomlinson (child)	8,000
Fenton Tomlinson (child)	8,000
Howard Tomlinson (child)	8,000
Baby Tomlinson (child)	8,000

(Record, p. 9; *ib.*, p. 113).

There can not be the least doubt, in any conceivable view of the case, that this verdict was unsupported by any evidence before the jury, was grossly excessive, and was rendered by the jury under the influence of passion, or prejudice, or some other improper and unworthy motive, and ought not to have been allowed by the trial court to stand for one moment.

It was the proper duty of the court, independently of any motion by the defendant for a new trial, promptly to set aside the verdict.

This was perfectly well understood by the attorneys for the plaintiff, when they sought, as will be seen, to *write off* nearly two-thirds of this unconscionable verdict, and divide the balance into shares among the

parties alleged to be entitled in the complaint, in a manner deemed suitable by them, but which had no relation whatever to the apportionment made by the jury of the damages awarded by it, under paragraph 2155 of the Arizona Statutes.

That paragraph, as has been seen, expressly empowered and required the *jury*, and the *jury alone*, to *fix the shares* of any recovery which the parties, for whose benefit the action was brought, should be respectively entitled to receive.

The Motion for a New Trial.

The verdict, as above, was rendered on June 7, 1892.

On June 8, 1892, the defendant moved the court to set aside the verdict and grant a new trial for the reasons set forth in the motion, which was as follows:

"Now comes the defendant and moves the court to set aside the verdict and grant a new trial of this cause on the following grounds, viz.:

"*First.* Errors of law committed by the court during the progress of the trial, which will be fully set forth in the statement of facts and bill of exceptions to be filed and settled.

"*Second.* That the evidence is insufficient to support the verdict.

"*Third.* That the verdict is against the law.

"*Fourth.* That the verdict is against the law and the evidence.

"*Fifth.* That the damages assessed by the jury in their verdict is excessive, unsupported by the evidence, and were given under the influence of passion and prejudice.

"This motion is based upon the minutes of the court, record of the case, and statement of facts and bill of exceptions to be hereafter filed." (Record, p. 6; *ib.*, p. 114.)

It was indisputably the duty of the trial court to grant this motion.

Upon no question in the case was the verdict warranted by the evidence.

The jury were not justified in finding that the servants of the defendant were guilty of the negligence alleged in the complaint.

The only reasonable and justifiable inference from the evidence in the case was that Thomas Tomlinson came to his death by going upon the railroad track without looking to see whether a train was coming, or heedlessly and recklessly attempting to cross the track in front of an approaching train in sight.

The case was plainly within the rule stated by Mr. Justice Field, speaking for this Court, in *Railroad Co.* v. *Houston* (95 U. S., 702):

"She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity can not be cast upon the defendant."

The case is well described by the observations of Mr. Justice Brewer, speaking for this Court, in a recent case :

"But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highways and employés on the road, affirmed to be negligence. *The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.*"

Elliott *v.* Chicago, Milwaukee, &c., Railway, 150 U. S., 248.

Moreover, there was no evidence before the jury, as has been said, tending to sustain, justify, or excuse the amount awarded as damages to the plaintiff and her co-beneficiaries. The verdict was not fit to be made, and could not legally be made the basis of any judgment of the court in the action. It was fit only to be set aside as improper and unjust.

It appears by the Bill of Exceptions, that on the 10th day of June, 1892, the plaintiff, in open court, made and filed and offered a *remittitur*, as follows :

"Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict, heretofore rendered herein, in the sum of $50,000, the following sums:

Bertha Tomlinson.....	$8,000,	remitted	to	$6,000
Alice Tomlinson..	8,000,	"	"	3,000
Fenton Tomlinson.....	8,000,	"	"	3,000
Howard Tomlinson.....	8,000,	"	"	3,000
Baby Tomlinson..	8,000,	"	"	3,000
Fenton Tomlinson, father....	5,000,	"	"	1
Mary Tomlinson, mother	5,000,	"	"	1

thereby making a total remittance of $31,998, and allowing the verdict to stand in the sum of $18,002.

"BAKER & CAMPBELL, and
"G. C. ISRAEL,
"*Attorneys for Plaintiff and Beneficiaries.*"

The defendant *objected* to the remittance being allowed; whereupon the court sustained the remittance, overruled the motion for a new trial, and ordered judgment for the sum of $18,002; to which the defendant then and there *excepted*, and time was given the defendant during the continuance of the term of the court to prepare and file a bill of exceptions thereto. (Record, p. 9, fol. 19.)

The Judgment.

On June 11, 1892, the court rendered and entered a judgment against the defendant, the Southern Pacific Company, for $18,002, with interest, for the benefit of the parties named in the complaint, and *as by the remittitur apportioned among those parties.*

This judgment of the District Court as rendered, after reciting the verdict of the jury, the motion of the defendant for a new trial, the filing of the *remittitur*, the overruling of the motion for a new trial, and the order of the court for a judgment against the defendant in the sum of $18,002, *as by the remittance apportioned*, proceeds:

"Wherefore by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that the said plaintiff do have and recover from the Southern Pacific Company the sum of $18,002, with interest thereon from the date hereof at the rate of seven per

cent. per annum until paid, for the benefit of the persons hereinafter named, in the sums following, to wit:

Bertha Tomlinson, plaintiff	$6,000
Alice Tomlinson, *child*	3,000
Fenton Tomlinson, *child*	3,000
Howard Tomlinson, *child*	3,000
Baby Tomlinson, *child*	3,000
Fenton Tomlinson, *father*	1
Mary Tomlinson, *mother*	1

And it is further adjudged that the plaintiff do have and recover of and from the defendant her costs and disbursements incurred in this action, amounting to the sum of $978.55." (Record, pp. 10, 11.)

This judgment was in no sense a judgment *on the verdict*, but was a judgment on the so-called *remittitur*, regardless of the verdict of the jury, and was and is an unlawful proceeding and an illegal judgment against the defendant in the action.

It should have been set aside by the court below.

The Revised Statutes of Arizona, paragraph *823*, provide that "whenever in the progress of a cause either party is dissatisfied with any ruling, opinion, or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill."

Those Statutes further provide:

"*826.* The ruling or other action of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded *as excepted to in all cases.*

"*842.* When a *motion for a new trial is overruled the party who files the motion may except to such ruling*, and embody the same in a bill of exceptions, as

is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, *and the Supreme Court shall review such ruling on appeal or writ of error.*"

The Revised Statutes of the Territory of Arizona provide further for a *Statement of Facts*, which, in a sense, is supplementary to the bill of exceptions in the case in which such a statement is prepared and filed. (Rev. Stats., Arizona, 1887, paragraphs 825, 843, 845.)

Paragraph *825* provides that "where the *statement of facts* contain all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts."

And paragraph *845* provides that "the court may, by an order entered upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

Agreeably to these statutory provisions, the defendant prepared and filed its bill of exceptions to the judgment and order of the District Court overruling its motion for a new trial, and to the action of the court in sustaining the so-called remittitur, overruling the motion for a new trial, and ordering judgment against the defendant for the sum of $18,002, and as by the so-called remittitur apportioned among the parties named in it. (Record, pp. 8, 9.)

A Statement of Facts, under the Arizona Statutes, was also prepared, and filed of record by the defendant.

This Statement contains, as will be perceived, the evidence adduced by the parties at the trial, as well as all the proceedings had in the action up to the rendition of the judgment against the defendant. (Record, pp. 14–116.)

The Supreme Court of Arizona on appeal affirmed the judgment of the District Court.

The opinion of the Supreme Court, by Sloan, J., in the record, shows that the court considered and determined the case upon two questions : *First*, the question as to legality and validity of the proceeding and action of the District Court in sustaining the so-called remittitur, filed by the plaintiff, and rendering judgment against the defendant for the parties in interest in accordance therewith ; and, *second*, the ruling of the District Court upon the request of the defendant for an instruction to the jury to render a verdict for the defendant upon the evidence introduced by the plaintiff to support the action.

The court, considering the first question, among other things, said :

"Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside," and

"We rather incline to the view that the jury, having found the issues in favor of the plaintiff, *was then prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed,* to award damages, *largely in excess of what the proofs warranted.*"

Upon that view of the conduct of the jury, in dealing

with the case, and of the character of the verdict, and upon that view alone, it was the duty of the Supreme Court of the Territory, on the appeal, under the law of the Territory, to reverse the judgment as rendered by the District Court in the action, and order a *venire de novo.*

If "sympathy for the widow and children," and that "enlarged liberality of which juries in such cases are usually possessed," found expression and gratification in this verdict, awarding damages "*largely in excess of what the proofs warranted,*" in the language of the court below, the verdict was a thoroughly vicious one, no remittitur could cure the vice, and the District Court had no power or right to allow the verdict to stand or render a judgment against the defendant for any amount, and it was the duty of the Supreme Court of the Territory, upon its own premises, to reverse the judgment as rendered by the District Court in the action, and order a new trial of the issues in the case.

The other question considered by the court below was that presented by the refusal of the trial court to take the case from the jury after the plaintiff had introduced her evidence in support of the action.

The question was regularly before the Supreme Court of Arizona, under the law of the Territory, upon the exception taken by the defendant to the ruling of the trial court, which is incorporated in the bill of exceptions in the record.

The court below, as we will submit, erred in its conclusion that the trial court properly refused to instruct

the jury at the close of the plaintiff's case to render a verdict for the defendant.

Under the provisions of the Revised Statutes of Arizona, above presented, there could be no recovery against the defendant for any amount, on account of the death of Mr. Tomlinson, upon the pleadings and evidence in this action.

Assignment of Errors.

I. The trial Court erred in refusing to direct a verdict for the defendant, the plaintiff in error here, agreeably to the instruction to the jury asked by it, at the close of the plaintiff's evidence, as follows:

"The evidence in this case shows that Thomas Tomlinson (plaintiff's intestate), who was killed by the train, did not use ordinary care in crossing the railroad track, and under the law the plaintiff is not entitled to a verdict for the injury done. You are, therefore, instructed to find for the defendant."

The Court below erred in affirming the ruling of the trial Court refusing such an instruction to the jury.

II. The Court below erred in deciding that the case as made out by the plaintiff on the trial was sufficient to justify the trial Court in leaving the question of negligence on the part of the defendant to the determination of the jury, as well as the question of contributory negligence or its absence on the part of the deceased, under the provisions of the Revised Statutes of Arizona relative to "*Injuries Resulting in Death.*"

III. The trial Court and the Court below erred in not

deciding that the plaintiff could not recover and could not have a verdict against the defendant upon the complaint in this action, under the said provisions of the Revised Statutes of Arizona.

IV. The trial Court erred in not instructing the jury to render a verdict for the defendant upon the complaint in this action at the close of the evidence in the case, under the said provisions of the Revised Statutes of Arizona.

V. The trial Court erred in overruling the motion of the defendant to set aside the verdict and for a new trial, and in not setting aside the verdict and ordering a new trial.

The Court below erred in affirming the action and order of the trial Court overruling the said motion of the defendant, and in not deciding that the trial Court should have set aside the verdict and granted a new trial.

VI. The trial Court erred in allowing the plaintiff, one of the parties interested in the suit, to remit a portion of the amount of the verdict, and in rendering judgment against the defendant for the part of the amount of the verdict not so remitted, viz., $18,002, as by the so-called remittitur apportioned.

The Court below erred in affirming this action of the trial Court in the case.

VII. The Court below erred in deciding that the trial Court had the power and right, upon the record in this case, to allow the so-called remittitur, filed by the

plaintiff, overrule the motion for a new trial, and render the judgment entered by it upon such remittitur against the defendant for the sum of $18,002.

VIII. The Court below erred in deciding, although it was of opinion that the verdict of the jury for the sum of $50,000, was for a sum "largely in excess of the damages proven," and that "the jury, having found the issues in favor of the plaintiff, was then prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed to award damages largely in excess of what the proofs warranted," that the said verdict was not the result of or tainted by prejudice or passion, and that there was no error on the part of the trial Court in not setting aside the said verdict.

IX. The Court below erred in affirming the judgment rendered by the District Court against the defendant in this action, for the sum of $18,002, as by the so-called remittitur apportioned among the parties therein named, and in not reversing the said judgment.

Argument for the Plaintiff in Error.

FIRST.

The Revised Statutes of Arizona authorize an action against a railroad corporation for death caused by the negligence of the servants or agents of the corporation, only when such negligence was gross, as distinguished from ordinary negligence.

1. Chief Justice Waite, delivering the judgment of this Court in *The Harrisburg* (119 U. S., 199, 204), said:

"It was held by this Court, on full consideration, in *Insurance Company* v. *Brame*, 95 U. S., 756, 'that by the common law no civil action lies for an injury which results in death.' See, also, *Dennick* v. *Railroad Co.*, 103 U. S., 21. Such, also, is the judgment of the English courts, where an action of the kind could not be maintained until Lord Campbell's Act, 9 and 10 Vict., c. 93. It was so recited in that Act, and so said by Lord Blackburn in *Seward* v. *The Vera Cruz*, 10 App. Cas., 59, decided by the House of Lords in 1884."

Where, therefore, a right of action for injuries resulting in death, is given by a statute, it is wholly the creature of the statute, and the authority for any suit to recover damages on account of such injuries, if found at all, must be found in the written law itself.

2. By paragraph *2145* of Title 36 of the Revised Statutes of Arizona, "*Injuries Resulting in Death*," it is provided as follows:

"An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases:

"1. When the death of any person is caused by the *negligence* or carelessness of the *proprietor*, *owner*, *charterer*, *or hirer of any railroad*, steamboat, stage coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, *gross negligence* or carelessness of their *servants or agents.*

"2. When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another."

The Arizona Statutes thus afford no right of action against "the proprietor, owner, charterer, or hirer of any *railroad*" for the death of a person, caused by the negligence of the *servants* or *agents* of the proprietor,

charterer, or hirer of the railroad, unless such negligence was "*gross*," as distinguished from ordinary negligence.

The language and intent of paragraph *2145* are entirely free from ambiguity or doubt.

The object was, by the insertion of the word "*gross*" before the word "negligence," in the last line of the first clause of the paragraph, to give an action against the carriers to whom it applies for fatal injuries, caused by the negligence of their servants or agents, only when such negligence was *gross*, and to afford no remedy against the principal, when the death was caused by the ordinary negligence of its servants, agents, or employés.

The statute established a difference between the liability of a railroad company for the acts of its representative in its corporate capacity, and its liability for the acts of its ordinary servants, agents, or employés.

3. The provisions of Title 36 of the Revised Statutes of Arizona, on the subject of "*Injuries Resulting in Death*," were copied from the original articles of the Revised Statutes of Texas upon the same subject. (2 Sayles' Texas Civil Statutes, Articles 2899 to 2903. inclusive.)

Paragraph *2145* of the Revised Statutes of Arizona is Article *2899* of the Revised Statutes of Texas, as originally enacted, which read as follows:

"An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

"1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stage-

coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness or *gross negligence* or carelessness of their servants or agents.

"2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

Article *2899* of the Revised Statutes of Texas was amended by an act of the Legislature of Texas, passed March 25, 1887, and the amendment consisted in omitting the word "gross," preceding the word "negligence," in the last line of the first paragraph of Article *2899*, the original article reading, as shown above, "or by the unfitness or *gross negligence* or carelessness of their servants or agents."

The Supreme Court of Texas interpreted Article *2899* of the Revised Statutes of that State in several cases, and determined conclusively that under the provisions of that article, as originally framed, there could be no recovery against a railroad company for injuries resulting in death caused by the negligence of the *servants or employés of the company unless the negligence was "gross."*

It was adjudged that the article, before its amendment by the Act of March 27, 1887, by the omission of the word "gross," as descriptive of the degree of negligence upon which the right of action was given, afforded no remedy against a railroad company, when the death was caused by the *ordinary negligence* of the *servants or agents* of the corporation.

The Supreme Court of Texas in *Hendrick* v. *Walton* (69 Texas, 192, 195), after quoting the original provis-

ions of Article 2899 of the Revised Statutes, as given above, said:

"In the first place, it is to be observed that this is not the regulation or extension of a right previously existing at common law. The right of action for injuries resulting in death is wholly the creature of the statute, and the authority of the suit here brought, if found at all, must be found in the written law itself.

"Neither principal nor agents are named in the subdivision in question (subdivision 2). But in *subdivision 1*, immediately preceding this, an action is given against the carriers to whom it applies for fatal injuries not only caused by their own personal negligence, but also where accruing from the *gross negligence of their servants or agents.* This provision has been construed by this Court in the case of the *Missouri Pacific Railway Co.* v. *Scott*, decided 1886, and is held to afford no remedy against a Railroad Company when the death is caused by the mere *ordinary neglect of the servants or agent of the corporation.* This law was amended by the omission of the word '*gross*,' by the Act of March 25, 1887; but the amendment was subsequent to the accrual of the alleged cause of action in this case, and has no bearing upon the question. * * *

It is clear, therefore, that in the first subdivision of Article 2899, the Legislature did not mean to apply the rule that the act of the agent is the act of the principal, because for the ordinary negligence of the agent it does not make the principal liable."

In *Railway* v. *Hill* (71 Texas, 451) the Supreme Court of Texas said:

"To entitle the plaintiffs to recover, it devolved upon them to prove that the death, when caused by the negligence of the servants, etc., was by their *gross negligence.* This is obvious from the language of the statute giving the action. If the Court needed precedent in holding that when the action is given by statute upon gross negligence of the servants, the plaintiff, availing himself of such right, should bring himself reasonably under its terms, we have such precedent in the case of *Missouri*

Pacific Railway Company v. *Scott*, 1886 (not reported), cited with approval in *Hendrick* v. *Walton*, 69 Texas, 195; and as holding that this provision, before its amendment, March 25, 1887, by the omission of the word "gross," as descriptive of the degree of negligence upon which right of action was given, afforded no remedy against a railroad company when the death was caused by the ordinary neglect of the servants or agents of the corporation. So, in 57 Texas, 306, *Railway* v. *Cowser*, this difference was recognized between the liability of a railroad owner, etc., for the acts of its representative in its corporate capacity, and for the acts of a mere ordinary servant."

The Supreme Court of Texas, in the case of *Sabine and East Texas Railway Company* v. *Hanks* (73 Texas, 323), held that prior to the Texas Act of March 25, 1887, omitting the word *gross* from Article 2899, paragraph 2, of the Revised Statutes of Texas, a railroad company could not be held liable for injuries resulting in death, caused by the *negligence* of the servants of the company, unless the negligence was *gross*.

The Court, in that case, said:

"The death of the child was alleged and proved to have occurred on July 6, 1886. *The negligence shown by the evidence, if any, was that of the servants of the company operating its train.* As the law then was there could be no recovery against a railroad company for injuries resulting in death caused by the negligence of the mere *servants* of the company *unless the negligence was gross.* (Rev. Stats., Art. 2899, par. 2.) This was so held by this Court in the cases of *Railway Company* v. *Scott*, Tyler Term, 1886, not reported, and in *Railway Company* v. *Hill*, 71 Texas, 451. The amendment to the article of the Revised Statutes above cited which omitted the word '*gross*' before the word 'negligence,' passed March 25, 1887, does not affect the rights of the parties in this action. Laws 20th Leg., p. 44.

"The charge of the Court is erroneous, and the evi-

dence being in conflict both as to the fact and degree of negligence, the judgment will be reversed, and remanded for a new trial under proper instructions.

"In view of another trial we may remark that so much of the charge as instructed the jury that the plaintiff was entitled to recover if the servants of the company *saw the child was in danger and failed to exercise the highest degree of care to avoid the accident. Even if the servants saw the danger, the company was only responsible for their* GROSS NEGLIGENCE."

4. The Legislature of Arizona, in adopting the provisions of the Revised Statutes of Texas, on the subject of injuries resulting in death, must be presumed to have intended to adopt the known judicial construction placed upon the Texas statutes, which was incorporated in effect into the Revised Statutes of Arizona, (Cathcart *v.* Robinson, 5 Pet., 265; Pennock *v.* Dialogue, 2 Pet., 1; McDonald *v.* Hovey, 110 U. S., 619, 628.)

SECOND.

By the provisions of the Revised Statutes of Arizona, exemplary damages are not allowed and can not be recovered, in a suit against a corporation for injuries resulting in death, caused by the willful act or omission, or the gross negligence of the servants or agents of the corporation.

1. Paragraph 2147 of the Arizona Statutes provides as follows:

"When the death is caused by the willful act or omission, or gross negligence of the *defendant*, exemplary as well as actual damages may be recovered."

It is thus seen that by the Arizona Statutes exemplary damages are allowed only for the willful act or

omission, or the gross negligence, of the "*defendant*," to a suit for the recovery of damages on account of injuries resulting in death.

If the "*defendant*" is a *corporation*, such damages are recoverable, in a proper case, for the willful act or omission, or gross negligence, of the *representative of the corporation in its corporate capacity*, as a corporate officer, but not of a person who is only a servant, agent or employé of the corporation.

The Supreme Court of Texas has defined "gross negligence," as follows:

"Gross negligence is defined to be 'that entire want of care which would raise a presumption of conscious indifference to consequences.' *Cotton Press Co.* v. *Bradley*, *52 Texas*, *600*. And, again, it is said, 'negligence can not be considered '*gross*' unless evidenced by an entire failure to exercise care, or by the exercise of so slight a degree of care as to justify the belief that the person on whom care was incumbent, was indifferent to the interest and welfare of others.' *Railway Co.* v. *Cooke*, *64 Texas*, *156*."

Dallas City R. R. Co. *v.* Beeman, 74 Texas, 291, 294.

2. The construction of the Arizona Statutes above presented, was the construction given by the Supreme Court of Texas to the Revised Statutes of that State, which contain, as has been said, the same provision in respect to *exemplary* damages as the Revised Statutes of Arizona.

The point was expressly adjudged by the Supreme Court of Texas in *Houston and Texas Central Railway Co.* v. *Cowser* (57 Texas, 305), where that Court said:

"The statute clearly draws the *distinction* between an act done by the proprietor, owner, charterer, or hirer of a railroad, and one by their servants or agents, and also between *actual* and *exemplary* damages. In our opinion, under its proper construction, although *actual damages* may be given for death caused by the unfitness, gross negligence, or carelessness of such servant or agent, as well as for the negligence or carelessness of the proprietor, owner, charterer, or hirer himself, yet that *exemplary damages are allowed only for the willful act, omission, or gross negligence of the 'defendant' to the suit, if a corporation, for the willful act, omission, or gross negligence of one representing it in its corporate capacity, as a corporate officer, but not of a mere ordinary servant or agent.*

"Exemplary damages being penal in their character, for a *quasi* criminal act, involves on the part of him who commits the act the question of an express willful intent, or that degree of gross negligence which implies it. This criminal intent should not by implication be imputed to the principal, when the act has neither been authorized nor ratified by him, so as to make it in law virtually his own act.

"The above distinction between the liability of the principal for actual and for exemplary damages for the act or omission of the servant or agent, is founded upon natural justice, was recognized in *Hays* v. *R. Co.*, 46 Tex., 272, and numerous other cases."

THIRD.

The complaint, in this case, did not state facts sufficient to constitute a cause of action against the defendant company under the law of Arizona, as above presented. The District Court should have sustained the demurrer to the complaint. No verdict or judgment could properly be rendered against the defendant, in this suit, under the law of the Territory.

1. As has been seen, a railroad corporation is liable,

under the law of Arizona, for death by the negligence of its servants or agents, *only* when such negligence was *gross*. The corporation is not responsible for fatal injuries caused by the *ordinary* negligence of its servants or agents. Such is the express provision of the Revised Statutes of that Territory, which do not exact the same degree of care of the servants or employés of a railroad corporation as it exacts of the corporation itself, as has been fully shown under the first point of this argument.

2. "The declaration," says Mr. Gould, "being the statement of those facts on which the plaintiff founds his right of recovery, must, of course, allege *all that is essential* to his right of action. For he can recover only *secundum allegata et probata;* and can legally prove no material fact which the declaration does not allege." (Gould's Pleading, ch. iv, sec. 7.)

Agreeably to this elementary rule of pleading, it is incumbent on a party seeking a recovery against a railroad company, under this law of Arizona, for injuries resulting in death, alleged to have been caused by the negligence of the *servants* of the Company, to aver in his complaint that such negligence was *gross*, as that is the very *gist* of the action, and without it there is no *cause* of action against the corporation.

The right of action in such a case being given by the Statute upon gross negligence of the servants, the plaintiff, availing himself of such right, must bring himself, by the averments of his complaint, within the terms of the statute.

This is understood to be the rule of pleading in Texas under the like Statute in force in that State.

(Houston and Texas Central Railway Co. *v.* Cowser, 57 Texas, 305.)

3. It is not alleged, in this complaint, that the acts and omissions of the servants of the defendant, to which the accident is attributed, constituted gross negligence or carelessness, or that the death was caused by the gross negligence or carelessness of the servants of the company in charge of the train at the time of the accident. The complaint thus disclosed no right of action against the defendant under the Arizona law, and no verdict or judgment against the defendant could be rendered upon the complaint, under that law.

FOURTH.

The verdict of the jury for $50,000 against the defendant, in this case, was unauthorized by and in violation of the law of Arizona, as above presented. The District Court should have set aside the verdict, as soon as rendered, and had no right to render any judgment against the defendant in the case.

1. The verdict was vicious and illegal whether it is supposed it was rendered in respect to the "actual damages" pretended to have been sustained by the persons for whose benefit the suit was instituted, or whether it is supposed that it was for "exemplary damages."

As will be seen, there was no evidence, in the case, tending to prove that the death was caused by the negligence, much less the unfitness or the gross negligence or carelessness, of the servants of the company in charge of its cars at the time of the accident.

Moreover, there was not a *scintilla* of evidence warranting the jury in finding or believing that the parties sustained "actual damages," by the death of Thomas Tomlinson, to the amount of the verdict.

In fact, as will be seen, the plaintiff adduced no evidence, at the trial, by which the jury or the Court could legally measure or determine the amount of the pecuniary injury, and the respective pecuniary losses, if any, sustained by the persons for whose benefit the suit was brought, by reason of the death of Thomas Tomlinson; and the verdict, in any view of it, was necessarily, therefore, wholly and merely a speculative and fanciful one, which should have been immediately set aside by the District Court, as a verdict upon which the law did not permit any judgment to be rendered by the Court against the defendant.

Paragraph 2155 of the Revised Statutes of Arizona provides:

> "The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

The corresponding provision of the Revised Statutes of Texas has been considered and construed by the Supreme Court of that State, which has often adjudged that the damages which may be given by the jury, under that provision, are for the pecuniary injury and the pecuniary losses only, and that the party claiming damages must adduce such proof as will enable the

jury to return a verdict based upon the evidence, which will approximate reasonable certainty, and enable the Court to pass advisedly, in reviewing the evidence, on a motion for a new trial. (Cotton Press Co. *v.* Bradley, 52 Tex., 601 ; March *v.* Walker, 48 Tex., 375 ; Houston and Texas Central Railway Co. *v.* Cowser, 57 Tex., 305).

The Supreme Court of Texas, in the case of *Houston and Texas Central Railway Co.* v. *Cowser* (*supra*) said :

"The measure of damages in such a case, as said in *March* v. *Walker*, *48 Tex.*, 375, is the pecuniary injury sustained, and is not the same as when the party who is himself injured sues and recovers compensation for physical and mental suffering. It has been almost universally held that the principle under which such damages are to be assessed, under similar statutes, is that of *pecuniary injury*, and not as *solatium*. (2 Thompson on Neg., 1289, § 30 ; Pierce on Railroads, 393.)

* * * * * *

"The damages being for the pecuniary loss only, the party claiming them should then, as a general rule, be required to prove such facts and circumstances as will enable the jury to return a verdict, based upon this evidence, which would approximate reasonable certainty, and the Court to pass advisedly, in reviewing this evidence, on motion for a new trial.

"*This testimony would include the circumstances of the deceased ; his occupation, age, health, habits of industry, sobriety and economy ; his skill and capacity for business ; the amount of his property ; his annual earnings ; and the probable duration of life.* Pierce on Railroads, 396 ; 2 Thompson on Neg., 1290.

"In the case now before the Court, the plaintiffs did not show the pecuniary circumstances of the deceased, and what his wages had been, or then were. Without such evidence, the verdict of the jury could have been but little more than a merely *speculative one*, and the Court had no standard by which to determine its correctness.

"As presented by the record, there was nothing which could relieve the verdict of the character, which the first blush would stamp upon it, that it was greatly excessive, and not warranted by the testimony.

"It should have been set aside by the court, and a new trial granted, and the failure to do this was error, for which the judgment is reversed."

The only testimony, in this case, bearing in any manner on the subject of the damages, was that of the plaintiff, Mrs. Tomlinson; but her testimony, as will be seen, embraced and related to no facts upon which the jury could base any estimate and award of the pecuniary damages "proportioned to the injury resulting from the death" of Thomas Tomlinson. (Testimony of Mrs. Tomlinson, Record, pp. 71, 72.)

There is nothing in the record "which could relieve the verdict of the character which the first blush would stamp upon it, that it was grossly excessive, and not warranted by the testimony."

2. If the jury may be supposed to have assumed the power to attempt to *punish* the defendant corporation, by the verdict in this case, the verdict was an unauthorized and illegal one under the Arizona law, as there could be no pretense that the death was caused by the willful act or omission, or the gross negligence or carelessness of any corporate officer representing the defendant company in its corporate capacity.

"Exemplary damages" are not permissible in such an action as this, under the law of Arizona, as has been seen, even where it is proved, and the jury are justified in finding, that the death was caused by the willful act

or omission or the gross negligence of the servants or employés of the corporation.

FIFTH.

The Court below erred in affirming the ruling of the District Court, by which it refused to instruct the jury at the close of the plaintiff's evidence that under the law the plaintiff was not entitled to a verdict, and the jury should find for the defendant.

1. The rule in Arizona, under the provisions of the Revised Statutes of that Territory, is that if the jury would not be warranted in rendering a verdict for the plaintiff at the close of his evidence, the defendant is entitled to a peremptory instruction to the jury to find for the defendant, and upon the refusal of such an instruction, to an exception which will preserve the question for an Appellate Court through the bill of exceptions and the statements of facts provided for by those statutes.

The exception is not waived by the defendant by introducing testimony on his own behalf.

Under this rule, the defendant, at the close of the plaintiff's evidence, properly asked the trial court to instruct the jury as follows :

"The evidence in this case shows that Thomas Tomlinson, who was killed by the train, did not use ordinary care in crossing the railroad track of the defendant, and under the law the plaintiff is not entiled to a verdict for the injury done. You are, therefore, instructed to find for the defendant."

The defendant excepted to the ruling of the District Court refusing this instruction, and embodied the ex-

ception in its bill of exceptions, and statement of facts, in the present record. (Record, p. 9 ; p. 72.)

The questions presented to the District Court by the proposed instruction were considered and determined by the Supreme Court of the Territory, on appeal, and decided against the defendant, the plaintiff in error here. (Opinion, Rec., pp, 122, 123.)

It was conceded below that if the trial court erred in refusing the requested instruction to the jury the judgment, as rendered by the District Court, would have to be reversed and a new trial granted.

It was unnecessary in this case, for the defendant, to renew the requested instruction to the jury, upon the conclusion of the entire testimony, as there could be no valid recovery by the plaintiff, under the Revised Statutes of Arizona, upon the allegations of the complaint in this action, no matter what the evidence for the defendant might show in respect to any negligence or the degree of any negligence on the part of its servants in charge of its cars at the time of the accident.

The complaint, failing to allege that the servants of the Company were guilty of *gross negligence*, stated no *cause of action* against the defendant under the law of Arizona, and no evidence, on the part of the defendant, could help the plaintiff to a valid recovery in this action.

2. It will be perceived that the Supreme Court of the Territory, in its opinion sustaining the trial court in refusing, at the close of the plaintiff's evidence, to

direct the jury to return a verdict for the defendant, seemed to suppose that simple or ordinary negligence on the part of the servants of the Company, in the management of the train which struck Thomas Tomlinson, was sufficient to sustain this action for his death, under the provisions of the Revised Statutes of Arizona relative to "injuries resulting in death," in the absence of contributory negligence on the part of the deceased, and the same mistake in regard to the effect of those provisions of the Arizona Statutes appears to pervade the charge of the Judge who presided at the trial in the District Court.

Both Courts apparently failed to perceive that, under paragraph *2145* of the Arizona Statutes, the Railroad Company could be held responsible for the death in question by the negligence of the Company's servants only in case such negligence was "gross," in the meaning of that term as used in those statutes, and there was no right of recovery against the defendant if the death was caused by ordinary negligence of the Company's servants in charge of its cars, when the accident occurred, independently of any question as to the contributory negligence of the deceased.

3. It is quite apparent from the opinion of the Court below, in this case, that if it had understood the proper construction and meaning of the Arizona statutes, it would have *reversed* the judgment of the trial Court, upon the ground that there was nothing in the plaintiff's evidence to show "*gross negligence*" of the servants of the defendant, and that the trial Court,

therefore, under the law of Arizona, should have instructed the jury upon that evidence to render a verdict for the defendant.

The Court below said:

"We think the case as made out by the plaintiff sufficient to justify the Court in leaving the question of *negligence* on the part of the defendant to the determination of the jury, as well as the question of contributory negligence or its absence on the part of the deceased." (Rec., p. 123.)

If the Court below had known or understood that the plaintiff, under the law of Arizona, could not recover against the defendant without proving "*gross negligence*" of the *servants* of the defendant, it would have held no doubt that the trial Court erred in not instructing the jury, at the close of the plaintiff's case, to render a verdict for the defendant, and it would have *reversed* the judgment of the trial court.

The whole record shows that the defendant's prayer for instruction to the jury, at the close of plaintiff's case, was refused by the trial Court, and the ruling of that Court was affirmed by the Supreme Court of the Territory, upon the *false idea* that the defendant was responsible for *any* negligence, and not merely for the "gross negligence," of its servants operating the train which struck the deceased.

As it is evident that the decision of the Supreme Court of Arizona, affirming the ruling of the trial Court upon the defendant's prayer, proceeded upon an erroneous view of the liability of the defendant, under the Revised Statutes of Arizona, for negligence of its

servants, it would clearly seem that the decision of that Court should be reversed by this Court, and the Supreme Court of Arizona should be directed to order a new trial.

SIXTH.

It is manifest that the case, as made out by the plaintiff, was not sufficient to justify or warrant the trial Court in refusing to instruct the jury to render a verdict for the defendant, under the Revised Statutes of Arizona.

1. The evidence was not legally sufficient to warrant the jury in finding that the servants of the defendant were guilty of negligence, much less "gross negligence," under the Revised Statutes of Arizona, and that the deceased exercised the care and caution which the law required him to exercise, at the time and place of the accident, in order to avoid such an accident, and that he was not guilty of negligence. The evidence pointed directly to the carelessness of the deceased in undertaking to cross the tracks, in the railroad yard of the defendant, that night, and entitled the defendant to a verdict.

The plaintiff's evidence distinctly failed to show any cause of action for this death under the law of Arizona.

2. What, then, was this evidence? (See Testimony for the Plaintiff, Statement of Facts, Record, pp. 14–72.)

The accident occurred in the railroad yard of the defendant at Casa Grande, on the night of June 24, 1891,

and the trial was in June, 1892; so that when the witnesses said they heard no signals given by the train, they spoke of what they said they did not hear a year before they testified.

The witnesses for the plaintiff were a number of persons living in Casa Grande, who said they saw a west bound freight train come into the railroad yard at that place, on the night of June 24, 1891, and their testimony tended to prove that the train struck and injured Mr. Tomlinson while he was attempting to cross the defendant's tracks in the railroad yard; but none of them saw the accident. No one of the witnesses saw Tomlinson step upon the tracks, or saw him when he was struck, or knew whether he was undertaking to cross the tracks from the north or from the south side of the railroad yard, when he was injured.

It appeared that Tomlinson had lived, for a long time, in a house south of and facing the tracks, and had a store nearly opposite, on the north side of the tracks, and facing them, near the depot, and that he crossed the railroad, between his house and store, every day, so that presumably he was perfectly familiar with the situation and surroundings, and knew how to take care of himself, if he chose to do so, in going across the tracks either from the north or from the south of the yard at night.

The evening of the 24th of June, 1891, was a warm one, people were sitting out of doors, and all of the persons called as witnesses for the plaintiff saw the approaching train some time before it reached Casa Grande.

Mr. Dunbar, sitting in front of McQueen's saloon, on

the north side of the road, saw the headlight of the locomotive *four or five miles* away. (Rec., p. 27.) Mr. Reese saw it about one mile off. (*Ib.*, p. 33.) Mr. Richmond saw it about half an hour before the train came into Casa Grande. (*Ib.*, p. 51.) Mr. Creamer, the keeper of a saloon on the north side of the tracks, who said he saw Tomlinson leave the saloon about twenty minutes before the train came in, observed the headlight *seven or eight miles* from Casa Grande. (*Ib.*, p. 41.) Mr. Cummings, sitting in front of Creamer's saloon, saw the light about *two or three miles* east of the village. (*Ib.*, p. 48.) Other witnesses saw the train as it was nearing the depot, and before the accident. (*Ib.*, p. 39.)

Mr. Dunbar said that he saw Tomlinson, about dusk, "go over to the saloon of Mr. Creamer and stand in front of the saloon with a couple of gentlemen." (*Ib.*, p. 27.)

The saloon keeper, Creamer, saw Tomlinson leave the saloon about twenty minutes before the train came into Casa Grande. (*Ib.*, p. 41.) This place was immediately to the east of Tomlinson's store, which was about a hundred feet from the depot. (*Ib.*, p. 63.)

These persons did not see Tomlinson again until after he was injured.

Several of the witnesses were asked their opinion as to the speed of the train before the accident. One said he thought the train was going fifteen miles an hour; another said eighteen to twenty miles an hour. (Rec., pp. 29–35.) A witness who thought the speed was twenty miles an hour, admitted that this was only a "guess," and that nobody "except the engineer that runs a train" can tell how fast it is going. (Rec., p. 58.)

Most of the witnesses said they heard no whistle or bell before the accident; but one witness stated he "*heard them blow the whistle the other side of the town, below the tank-house, to the east.*" (Rec., p. 56.) He also said that the bell might have been rung there without his hearing it. (Rec., p. 57.)

This testimony about the supposed speed of the train and the signals was given a year after the occurrence, and was not worth much.

All the witnesses admitted that the train, which was a long freight or cattle train, came to a standstill very quickly, almost instantly, when Tomlinson was struck, showing that it could not have been going as fast as they supposed. The engine stopped a little west of the depot.

The theory of the plaintiff, at the trial, seemed to be that Tomlinson, when he was struck, was attempting to cross the tracks from the north to the south side of the railroad, that he could not see the approaching train on account of a lumber pile on the north side of the railroad, about 123 feet from the depot, and that *the train stole down upon him unawares, and killed him.*

But the testimony about this lumber pile showed very conclusively that after a person who was attempting to cross at that point passed the lumber pile, and got on the north side track, he could see the headlight of a locomotive to the east several hundred yards, and that from the space between the north side track and the main track, he could see a train approaching a few hundred yards beyond the tank house. (Rec., p. 64.)

It was shown that the tank house was 1,400 or 1,500 feet from the depot. (Rec., p. 15.)

Besides, the testimony tended to show that it was negligence *per se* for Tomlinson to attempt to cross the tracks, at night, at the lumber pile. (Rec., pp. 64, 65.)

A witness, who explained the situation there, said, "*I never cross at the point at the lumber pile; I cross at the depot.*" (*Ib.*, p. 65.)

But none of the plaintiff's witnesses knew from which side of the railroad Tomlinson undertook to cross the tracks; and it was admitted by them that there were no obstructions on the south side of the railroad at that time.

There was no attempt to prove that the accident occurred at the crossing of "any public street, road or highway," in the meaning of paragraph 322 of the Revised Statutes of Arizona.

The evidence showed that Tomlinson was injured while upon the private right of way of the defendant in its railroad yard at Casa Grande.

3. The trial Court, upon this evidence, should have withdrawn the case from the jury and directed a verdict, under the doctrines affirmed by this Court, and other Courts of high authority in similar cases. (Railroad Co. *v.* Houston, 95 U. S., 697; Schofield *v.* Chicago & St. Paul Railway Co., 114 U. S., 615; Railroad Co. *v.* Norton, 24 Pa. St., 465; Phila. & Reading R. R. Co. *v.* Hummell, 44 Pa. St., 375, Opinion by Strong, J.; Mulherrin *v.* Delaware, &c., R. R. Co., 81 Pa. St., 366; Cordell *v.* N. Y. Cen. & H. R. R. R. Co., 75 N. Y.,

330; Hinckley *v.* Cape Cod R. R. Co., 120 Mass., 258; Brown *v.* Milwaukee Railway Co., 22 Minn., 165.)

Tomlinson was on the private right of way of the defendant, in its railroad yard, at the time of the accident; and if the facts were that the train was going at a high rate of speed, and the whistle was not blown, and the bell was not rung, they were no evidence of even ordinary negligence, much less "gross negligence," on the part of the servants of the defendant operating the train.

The defendant had the right to insist upon a clear and free track in its station yard at night, at least, and when the deceased undertook to cross the rails at the place and time of the accident he did so at his peril, agreeably to the principles adjudged by the authorities above cited.

The Supreme Court of Pennsylvania, in the leading case of *Philadelphia & Reading Railroad Co.* v. *Hummell*, cited above, Mr. Justice Strong delivering its opinion, adjudged that a Railroad Company has the right to presume that persons will not trespass upon its right of way; therefore, it is under no obligation to take precautions against possible injuries to intruders upon it; and that the duty to guard against injury to trespassers upon the track is no higher than that imposed upon an individual with reference to persons who willfully trespass upon his private property.

The doctrine was reaffirmed by the Supreme Court of Pennsylvania, in *Mulherrin* v. *D. L. & W. R. R. Co.* (81 Pa. St., 366), as follows:

"Except at crossings where the public have a right of way, the *man who steps his foot upon a railroad track does so at his peril.* The company have not only a right of way, but such is *exclusive at all times and for all purposes.* This is necessary not only for the proper protection of the company's rights, but for the safety of the traveling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a *single foolhardy man who desires to walk upon the track.* In England it is a penal offence for a man to be found unlawfully upon the track of a railroad. It would add materially to the public safety were there a similar law here."

The doctrine thus stated is the recognized law not only of Pennsylvania, but of other States of the Union; and it has been explicitly held, also, that the acquiescence of a railroad company in the use of its track or right of way by persons passing along it, as a footway, does not give such persons a right of way, or make the company's liability greater than to any other trespassers. (Illinois, &c., R. R. Co. *v.* Godfrey, 71 Ill., 500; Nicholson *v.* Erie Rwy. Co., 41 N. Y., 525; Sutton *v.* N. Y. C. & H. R. R. Co., 66 N. Y., 243; Gaynor *v.* Old Colony R. Co., 100 Mass., 208.)

Moreover, the jury would not have been justified in finding from the plaintiff's evidence that the deceased was not guilty of negligence in his attempt to cross the tracks. The evidence, as we have said, pointed directly to the carelessness of the deceased, and required the conclusion that he either neglected to look in a proper manner for an approaching train, or deliberately undertook to run a race with the cars, and get across the tracks before the cars came upon him, whether he

attempted to cross from the south side or from the north side of the station.

The Court of Appeals of New York, in the leading case of *Cordell* v. *New York Central and Hudson River Railroad Company* (75 N. Y., 330), speaking by Judge Earle, said :

"The care which persons are required to exercise at railroad crossings to avoid danger, is such as prudent persons, conscious of the danger to which they may be exposed, usually exercise. And this requires the vigilant use of the ear in listening, and of the eye in looking for approaching trains. When there is no evidence tending to establish such care, it is the duty of the court to non-suit.

* * * * * * *

"When there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be non-suited. The presumption that every person will take care of himself from regard to his own life and safety, can not take the place of proof, because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety.

* * * * * * *

"There were four persons who witnessed this accident, and were called to testify to what they saw. Let us first consider this case with their evidence eliminated, and then see how it stands."

After stating the general facts, among them, that the accident happened while the deceased was attempting to cross the track on foot ; that he lived near the track, and knew where it was, and all its surroundings ; that he was a man of mature age and judgment, possessed of all his faculties ; that there was no wind or storm to in-

terfere with sight or hearing; that there were obstructions west of the crossing intercepting to a considerable extent sight in that direction, yet according to the evidence most favorable to the plaintiff it was possible to see at least forty feet westerly before getting on the track; the learned Court of Appeals said:

"While these obstructions may have imposed upon the railroad company the duty of greater caution in running its trains, at that point, they also imposed upon the deceased greater care to avoid danger in crossing the track.

"*Now, suppose, under these circumstances, he had been found killed there, no human eye having witnessed the accident, could the plaintiff have recovered? We think not. There would have been no evidence from which a jury could justly have inferred that he used such care to avoid danger as the law requires.*

"A jury could not have indulged in the speculation that he looked both ways, and that '*the train stole down upon him*' unawares, and killed him.

"*No person could have said that the exercise of proper vigilance on his part would not have saved his life.*"

The jury could not legally find from the evidence introduced by the plaintiff, in this case, that the deceased exercised the care and circumspection properly to be demanded of one in his situation, to avoid such an accident.

SEVENTH.

The only legal conclusion justified or warranted by the evidence, in the case, was and is that the deceased, by his own negligence, was the author of his misfortune, and that there was no negligence of any kind on the part of the servants of the defendant. The trial Court should have directed a verdict for the defendant.

1. The defendant's evidence, at the trial, is contained in the Statement of Facts. (Record, pp. 72 to 108.)

The principal witnesses for the defendant were William A. Gunn, the engineer in charge of this train; M. F. Ingham, the fireman on the engine; Josias Wilkinson, the conductor; Andrew Hystrom and Joseph Brown, brakemen; L. L. English and Mary E. Woods, residents of Casa Grande.

The testimony proved not only that the whistle was sounded as usual, on the approach of the train to Casa Grande, but also that the bell was rung from the time the train entered the station yard at that place, to the time of the accident, and that the speed of the train, when it entered the yard, was not over twelve miles an hour.

It was shown by the testimony that the engine and cars were equipped with the latest improvement of the Westinghouse brake, and that the train was stopped as soon as it struck Mr. Tomlinson, who stepped on the track from the *south*, that is to say, the *left side* of the track, and was struck about 200 feet east of the depot crossing. (Rec., pp. 100, 101.)

Mr. Tomlinson thus had all the warning that could be given, and the accident was due entirely to his own carelessness or recklessness in attempting to cross the track on the right of way of the defendant.

The train was a special stock train of 20 cars and a caboose, about 600 feet long, between Tucson and Yuma, which reached the east portion of the Casa Grande station yard about 8.35 p. m. Before the accident, one long whistle was sounded for the station, about a mile from the station, and one long and two short whistles were sounded for the depot crossing, about a half a mile

from the crossing. (Wilkinson, Rec., p. 86; Hystrom, p. 90; Ingham, p. 96; Gunn, p. 100.)

The engineer shut off steam a mile and a half from the station, and no steam was used from that point to the place of the accident. The train was running twelve miles an hour, when it got to the tank house, which was about 1,275 feet from the depot. (Gunn, pp. 102, 103; Colton, p. 75.)

The fireman began to ring the bell, about the section house, or little east of the tank, and rang it up to the time of the accident. (Ingham, p. 96; Gunn, p. 100.)

The engineer testified in regard to the accident as follows:

"Q. Did anything occur there that night that occasioned your stopping there?

"A. It did.

"Q. Please state to the jury now what that was.

"A. We struck a man about 200 feet east of the depot crossing, knocking him off of the track.

"Q. About how far in front of the locomotive was the man when he stepped upon the track and when you saw him?

"A. When I saw him he was in the center of the track, about, probably, twelve feet in front of the engine.

"Q. Could you see the whole of the man's body at that time?

"A. No, sir; only saw the head and shoulders.

"Q. State the reason the whole of the body could not be seen.

"A. The headlight is nine feet above the track, and the ray of light is on an incline towards the track, and a man could step under the ray of light without being seen—part of him.

"Q. If he was farther in front you could see him plain?

"A. Yes, sir.

"Q. How far can you see a man in front of a locomotive at night with the headlight burning?

"A. Two hundred feet or more.

"Q. That night, if there had been a man 200 feet in front of the locomotive, would you have seen him?

"A. Yes, sir.

"Q. From what side of the track did he step on the track?

"A. From the left side.

"Q. Where is your position on the engine?

"A. On the right side of the engine.

"Q. What did you do after you found that the man had been struck?

"A. Applied the air; made an emergency stop; as quick as I could." (Rec., pp. 100, 101.)

The fireman, who also witnessed the accident, said:

"Q. Please describe what that accident was, and how it occurred?

"A. As we were entering the yard he had slowed the train down; just as he released the air there was a man *stepped on the track from my side of the engine and disappeared.*

"Q. What side of the engine is that?

"A. Left-hand side.

"Q. South or north side?

"A. South side, I guess you would call it.

"Q. How far ahead of the locomotive was it the man stepped on the track?

"A. I should judge about twelve feet, as near as I could tell.

"Q. After that what was done with the engine—the train?

"A. Mr. Gunn reapplied the air and stopped the train.

"Q. About what time of night was that?

"A. That was 8.35 or 8.40.

"Q. At the time the man stepped upon the track, did you see the whole of his body?

"A. No; I did not; all I could see was from his waist up." (Rec., p. 97.)

The conductor stated as follows:

"Question. Now, Mr. Wilkinson, state what occurred in the Casa Grande station yard that night.

"Answer. Well, when we were some distance out from Casa Grande, I heard the whistle blow the station whistle—one long blast—and about that time, or immediately afterwards, I noticed the train was slowing down. The train slowed down to some extent; I heard then the whistle blow for the crossings, just about half way between the whistling post for the station and Casa Grande; shortly afterwards the train stopped. I took my lantern and got down off the caboose and walked down the side of the train and found a man lying on the ground between the main track and the north side track, about half way between the caboose and the engine, injured. I sent a man to call an officer or a physician, or both. I went to the railroad office and reported the fact that there was some one injured, and I made a telegraphic report to my superintendent. I rendered what assistance I could in the way of making the man comfortable by giving the ice I had in the caboose." (Rec., p. 86.)

The conductor stated that the train began slowing down at a rate of speed exceeding twenty-five miles an hour, and slowed down to the point where it entered the Casa Grande station yard at about twelve miles an hour. It slowed down from the rate of about twelve miles an hour to a dead stand still. (Rec., p. 87.)

Mrs. Wood, living in Casa Grande, heard the noise of the train coming in, the rumbling, and heard the ringing of the bell, perhaps, about fifteen minutes before she heard of the accident. (Rec., p. 81.)

She found Mr. Tomlinson lying between the end of the lumber pile, on the north side of the track, and the depot.

Mr. English, who was camping out about two miles above Casa Grande, saw the train come in; saw the headlight of the locomotive; and heard the whistle blow twice between him and the town. (Rec., p. 84.)

Mrs. Wood was asked to state what Mrs. Tomlinson said:

"By the COURT:

"Q. Just what she said; remember her words, and repeat them.

"A. She says, 'I blame myself for it all; I asked Tom to go across the track when we saw the train coming, to get some beer and ice'; and she blamed herself repeatedly." (Rec., p. 82.)

Mrs. Tomlinson was recalled by the defendant, and testified as follows:

"Q. On the night of the accident, where were you?

"A. I was at my home in Casa Grande.

"Q. Was any one there present with you?

"A. A lady by the name of Mrs. Johnson.

"Q. Was your husband at home that evening?

"A. Yes, sir.

"Q. At about what time?

"A. Between eight and nine o'clock. I can't say at what time.

"Q. And about how long before you heard of the accident?

"A. Well, it might have been ten minutes. I couldn't say just exactly how long.

"Q. That is all." (Rec., p. 108.)

Mr. Tomlinson had undoubtedly returned home from his place of business, early in the evening, and was undertaking to cross again from the south side of the railroad, after the train was seen from his house, when he met with the accident.

EIGHTH.

The District Court erred in overruling the motion made by the defendant to set aside the verdict and grant a new trial. The Court below, also, erred in affirming the order of the District Court overruling that motion.

1. It has been seen that the day after the absurd verdict, in this case, was rendered, the defendant moved the District Court to set it aside, and direct a new trial, on the ground that there was no evidence before the jury which in law could support or justify any verdict against the defendant, and also on the ground that the damages assessed by the jury were excessive, unsupported by the evidence, and were given under the influence of passion and prejudice.

There can be no doubt that it was the proper duty of the trial court to grant the motion upon both these grounds and submit the case to the decision of another jury.

2. The statement which has been just made of the evidence in regard to the accident shows conclusively that there was nothing in that evidence which could sustain the action, or warrant or justify the jury in rendering a verdict for the plaintiff, and that the trial court should properly have instructed the jury to find a verdict for the defendant, under the settled principles of the law of this Court in such cases. (Railroad Co. *v.* Houston, 95 U. S., 697 ; Schofield *v.* Chicago & St. Paul Railway Co., 114 U. S., 615; Goodlett *v.* Louisville

Railroad, 122 U. S., 391; Elliott *v.* Chicago, Milwaukee, etc., Railway, 150 U. S., 246.)

Under the evidence as to the material facts concerning the accident, the action could not be maintained either upon the issue as to the negligence of the servants of the defendant, or the issue as to the contributory negligence of the deceased, and it would have been proper for the trial court to withdraw the case from the consideration of the jury, and direct a verdict.

It was, therefore, the duty of that Court to set aside the verdict after it was rendered.

The principle by which a trial court may and should withdraw a case from the jury when it would be compelled to set aside a verdict rendered for the plaintiff, requires it to set aside such a verdict in a case in which it would have been proper for it to direct the jury to return a verdict for the defendant.

3. It is equally clear that the trial court was required to set aside the verdict upon the ground, assigned in the motion of the defendant, that the damages assessed by the jury were excessive, unsupported by the evidence, and given under the influence of passion and prejudice, and that the trial court could not properly sanction, or countenance, in any manner the verdict as rendered in respect to the damages.

As we have said, the testimony of the plaintiff was the only testimony, in the case, which had any colorable bearing upon the matter of damages, but that testimony, as will be seen, was no proof of the damages resulting

from the death of the deceased, and was no warrant for a verdict for any sum as damages in favor of the plaintiff, and her co-beneficiaries, under the law of Arizona.

Neither the jury nor the trial court could ascertain from the testimony of Mrs. Tomlinson the amount of the pecuniary loss sustained by the parties to the action by reason of the fatal accident involved in this case.

The whole of the testimony of Mrs. Tomlinson was as follows:

"By Mr. ISRAEL:

"Q. Mrs. Tomlinson, are you the Bertha Tomlinson named in this action, of Bertha Tomlinson against The Southern Pacific Railroad Company?

"A. Yes, sir.

"Q. You knew Thomas Tomlinson in his lifetime?

"A. Yes, sir.

"Q. What relation did he bear to you?

"A. My husband.

"Q. When did he die?

"A. The 24th of June, 1891.

"Q. What was his age at the time of his death?

"A. Forty-one years.

"Q. Are there living any children the issue of your marriage with Mr. Tomlinson?

"A. Yes, sir.

"Q. What are their names and ages?

"A. Alice, aged nine years; Fenton, aged seven years; Howard, aged five years; and Baby, seven months.

"Q. Did Thomas Tomlinson leave any surviving parents?

"A. Yes, sir.

"Q. What were their names?

"A. Fenton and Mary.

"Q. Fenton Tomlinson and Mary Tomlinson?

"A. Yes, sir.

"Q. What was Mr. Tomlinson's avocation during his lifetime?

"A. Merchant.

"The COURT. His vocation, I suppose you mean?

"Mr. ISRAEL. Yes, sir.

"Q. What was your usual ordinary expenses of maintaining your household at the time of his death?

"A. I couldn't say; only guess; perhaps a thousand dollars a year.

"Q. What was his manner of supporting his family?

"Mr. ALEXANDER. Object.

"(Question not pressed.)

"Q. What was Mr. Tomlinson's general health at the time of his death?

"A. Good health.

"Q. What do you say his age was?

"A. Forty-one years.

"Q. What is your age?

"A. Thirty-three.

"Take the witness.

"(Not cross-examined.)

"Mr. ISRAEL. We have some tables here we would like to offer—the Carlyle life tables.

"The COURT. Those can be used at any time during the progress of the trial.

"Mr. ISRAEL. The plaintiff will rest." (Rec., pp. 71, 72.)

This testimony was no warrant for a verdict assessing the damages at the sum of $50,000, or any other sum, and apportioning the amount to the beneficiaries, under the Arizona Statutes; and the verdict, as we have said, was one only fit to be set aside by the trial court, as without the support of any evidence in the case.

NINTH.

The Court below erred in affirming the action and order of the District Court in assuming to allow the plaintiff, one of the parties to the suit, to write off a

portion of the excessive and unauthorized verdict, and in rendering judgment against the defendant for the rest, viz., $18,002, as by the so-called remittitur apportioned. It was the duty of the Court below to reverse that judgment.

1. It appears by the record that the nominal plaintiff "*on her own hook*," to use an expression of Chief Justice Jackson, of Georgia, in *Central Railroad* v. *Crosby* (74 Ga., 746), "*wrote off*" a portion of the verdict, cutting off the father and mother of the deceased with a dollar apiece, and that after this was done, the trial Court overruled the motion for a new trial, as if the act of the plaintiff cured the outrage of the verdict, and then gave a judgment against the defendant for the amount proposed by the plaintiff, divided among the parties to the suit in the manner which seemed appropriate and suitable by her.

The so-called remittitur, filed by the plaintiff, upon which the judgment was rendered and entered, was as follows:

"Comes Bertha Tomlinson, on behalf of herself and the others interested herein, and remits from the verdict, heretofore rendered herein, in the sum of $50,000, the following sums:

Bertha Tomlinson.....	$8,000,	remitted	to	$6,000
Alice Tomlinson..	8,000,	"	"	3,000
Fenton Tomlinson.....	8,000,	"	"	3,000
Howard Tomlinson.....	8,000,	"	"	3,000
Baby Tomlinson..	8,000,	"	"	3,000
Fenton Tomlinson, father....	5,000,	"	"	1
Mary Tomlinson, mother.....	5,000,	"	"	1

thereby making a total remittance of $31,998, and allowing the verdict to stand in the sum of $18,002."

It does not appear that there was any adjudication by the trial Court of the rights of the parties upon the motion for a new trial, which challenged the legality and good faith of the verdict upon the grounds which have been mentioned, or any order by that Court, in the exercise of any supposed judicial discretion, in the case, awarding a new trial unless there was an election to remit a designated part of the verdict, and directing that upon such remission judgment be entered for the rest.

The plaintiff fixed up and filed the so-called remittitur; the Court sustained it, overruled the motion for a new trial, and ordered judgment for the sum of $18,002, to which the defendant excepted.

The proceeding, in any view of it, was without validity, and not within or protected by any rule or the principle of any rule recognized by this Court in respect to the power of a court of common law, in adjudicating a motion for a new trial, to judicially ascertain and determine, where that is proper and possible, what part of a verdict may stand as a just estimate of the damages of the plaintiff, and to enter an order, in the disposition of the motion for a new trial, that a new trial be had, unless the plaintiff elects to remit the rest of the verdict.

2. The first question, in regard to the remittitur, is that of the authority and right of this nominal plaintiff to make the remission, and the power of the trial Court to allow it and render the judgment entered upon it against the defendant, under the provisions of the Revised Statutes of Arizona relative to "INJURIES RESULTING IN DEATH," which are above presented.

The Court below, considering this question, in its opinion, said :

"It is alleged by appellant that the Court erred in allowing the remittitur and entering judgment in accordance therewith, first, for the reason that the plaintiff had no *power* to remit any portion of the damages awarded by the jury, except, perhaps, the portion allowed to *her* by the verdict ; and, second, for the reason that the damages being excessive, it was evident that the jury in returning any verdict for the plaintiff, acted through passion or prejudice, and, therefore, a remittitur could not possibly operate to cure the verdict thus wrongfully found."

The Court then said :

"As to the right of the *nominal plaintiff* in an action for damages on account of injuries causing death, we are not cited to any authorities directly in point. Independently of the statute, the right to maintain such an action does not exist. *We are, therefore, left, in determining this question, solely to a consideration of the sections of the statute which bear upon the question.* * * * The paragraph last quoted (section 2150) gives the widow authority to bring suit for herself, children, and parents of the deceased. The authority to bring, *it seems to us*, includes also full authority to prosecute, control, and direct the suit to its final determination.

"If to *prevent a new trial being granted*, it be necessary to remit a portion of the damages awarded by the jury, we see no reason why she may not, under the statute, remit such *portion or portions as may be necessary to that end, and which she may consider in good conscience ought to be remitted.*"

The Court further said on this important question :

"While the record does not affirmatively show that the trial Court made a remission of a portion of the damages awarded a *condition precedent to his overruling the motion for a new trial, the damages awarded being clearly excessive*, we think it quite evident *that had the remittitur not been filed the Court would have granted the motion.*"

The argument of the Court below, upon the question presented, is plainly unsound, and was evidently regarded by the Court itself as not entirely satisfactory.

It is very clear upon the face, the principles, and the policy of the Arizona Statutes, that there can be no legal and valid judgment in such an action as this, except according to the verdict of a jury assessing the damages, and apportioning them among the parties entitled to the benefit of the suit, and that no estimate and apportionment of the damages can be made by the trial Court, on a motion for a new trial, with or without the consent of the nominal plaintiff, who is not at liberty and has no power to alter or affect in any manner the verdict of the jury by which the damages assessed have been divided among and apportioned to the respective beneficiaries of the action.

The common basis of the Arizona Statute giving such an action as this, and the Texas Statute, from which the Arizona law was derived, is Lord Campbell's Act, 9 and 10 Vict., c. 93, under which it is well settled that the action will not be supported for merely nominal damages, and that the substantial damages are not to be given as a *solatium*, but must be founded upon pecuniary loss, actual or expected, and are to be calculated by the jury in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased. (Duckworth *v.* Johnson, 4 H. & N., 653; Blake *v.* Midland Railway Co., 18 Ad. & Ell., 109; Franklin *v.* Southeastern R. Co., 3 H. & N., 211.)

The wrongful act or default, resulting in the death,

complained of, in such an action, is not a tort to the persons complaining of it until and unless they trace perceptible injurious consequences to themselves, capable of being measured by a *pecuniary* standard, and such damages must be ascertained and divided by the jury.

The Arizona Statute declares that "the action may be brought by all the parties entitled thereto, or by one or more of them *for the benefit of all;*" that it shall be the duty of the personal representative of the deceased to commence the action, if the parties entitled to the benefit of it fail to do so within six months after the death, "*unless requested by all of the parties entitled thereto not to prosecute the same;*" that the action shall not abate if the plaintiff dies pending the suit, unless he is the only party entitled to the recovery; that "if the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the Court, be made plaintiff, and the suit be prosecuted to judgment, in the name of such plaintiff, *for the benefit of the persons entitled;*" and that "the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall be alive, *in such shares as the jury shall find by their verdict.*"

It is manifest that the injury in respect to which the action is authorized, is regarded as an injury to the parties as *individuals*, rather than to a *class;* that the action by whomsoever brought, is for the benefit of all, and to the exclusion of none; that all the persons entitled to recover are substantial and real *plaintiffs;* that the nominal plaintiff has no control by the statute over

the rights of the other parties, before or after the verdict ; and that a verdict of a jury, ascertaining and dividing the damages, according to the requirements of the statutes, is and can be the only valid basis of a judgment, under the statute, against the defendant in the action.

This view of the legal construction and effect of the Arizona Statute is supported and confirmed by the decisions of the Supreme Court of Texas, expounding the parent statute in force in that State.

The Supreme Court of Texas, in *H. & T. C. R. W. Co.* v. *Bradley* (45 Tex., 171), held that the mother, as natural guardian of her minor children, had no authority to compromise the claim of such children for damages recoverable for the death of the husband and father by such causes as give to the children the right to damages.

The Court said :

"*The injury is to the parties as individuals rather than to a class.* The statute provides for the continuance of the suit by substituting one or more of the interested parties as plaintiffs in case of the death of the original plaintiff. The action, by whomsoever brought, is for the benefit of all, and to the exclusion of none."

In *March* v. *Walker* (48 Tex., 372), it was adjudged that it is the duty of the jury to find by their verdict the share of *each* of the beneficiaries in the damages assessed, and that their failure to do so, when asked by either party, is reversible error in the case.

The Court said :

"The statute directs that the *jury shall make such division.* Evidently, the actual and prospective dam-

age to children of different age or sex may vary greatly. The loss of a father would affect more injuriously an infant daughter than it would a son approaching manhood, and able to take care of himself. *The jury might very properly direct the greater part of the amount recovered to be given to the one most needy and most injured.*"

In *Railway Co.* v. *Moore* (49 Tex., 31), it was held that only *one* such action can be brought under the statute, and whether brought by one or all of the parties, it is for the benefit of all the parties entitled to share in the damages, and that where an *apportionment of the damages among the parties is not made in the verdict and judgment, it is error.*

In *Railroad Co.* v. *Le Gierse* (51 Tex., 201), the Court said:

"If all the parties are not before the Court as actual plaintiffs, the suit should proceed in the name of one or more *for the use and benefit of all.* If the pleadings do not disclose the names of all, the defect can be reached by plea in abatement. If the non-joinder is apparent of record, then it could be made available by demurrer.

"In the case before the Court, the petition disclosed that the two minor children were necessary beneficiaries in the judgment that might be rendered.

"The suit was prosecuted in the individual name of the plaintiff, and the judgment was rendered in her name only, and does not purport also to have been for the use and benefit of the minors.

"If it be admitted that the non-joinder could not be taken advantage of by general demurrer, which it is not necessary to decide, the existence and interests of the minors were apparent upon the record, and *it was error to proceed to trial and judgment without regard to their rights.*"

In D. & W. R. R. *v.* Spiker (59 Tex. 436), the petition of the widow of the deceased, disclosed that

the mother of the deceased was living and that he left neither children nor father, but the plaintiff did not profess to prosecute the action for the benefit of the mother as well as herself, and the *jury found damages in favor of the plaintiff alone.*

The Supreme Court reversed the judgment.

The Court said :

"If the suit had been prosecuted for the benefit of the *mother*, as well as the plaintiff, and evidence had been introduced to show what damages had resulted to the respective beneficiaries, and the jury had found that the mother had suffered no damage, that would have been conclusive of that question, if the finding was justified by the evidence. That, however, is not this case. The whole record shows that the suit was prosecuted for the sole benefit of the appellee.

"If the mother of the deceased had settled her claim for damages, that should have been shown, and the judgment could then stand.

"It is no answer to the objection taken to the verdict to say that there was no evidence showing the damages the mother has sustained, or that she has not sustained any.

"It is not any answer to the objection to say that the claim of the mother may be barred by limitation."

In the case of *Railway Company* v. *Culberson* (68 Texas, 664) the suit was brought by the appellee, on behalf of herself and two minor children, for the death of her husband. The appellee having obtained a verdict for damages, and apportioning them between herself and children, the Supreme Court held that the verdict could not stand, and reversed the judgment on it below.

The Court said :

"The error goes to the foundation of the action.

When the evidence developed the fact that the deceased had a mother, the proceedings should have been arrested until she was made a party, or the petition so amended that the suit would proceed *for her use as well as that of the other beneficiaries.*"

The doctrine was affirmed by the Supreme Court of Texas in *Ft. Worth & D. C. R. Co.* v. *Wilson* (22 S. W. R., 578), and it was held that where in an action by the wife for the benefit of herself and child, for the wrongful death of her husband, it appeared that both parents of the deceased were living, a *release* by the parents of all claims by reason of the son's death, constituted no defense to defendant's motion for a new trial, on the ground that the parents should have been made plaintiffs in the action.

The Court said:

"If at the trial a release is shown, the jury may still very properly consider what, *if anything, would have been the proper amount of recovery by the parties making the release, as well as the effect* that that *should have upon the amount of the judgment in favor of those who recover.* Such releases should be given the same effect as to the fact and amount of recovery by those for whom the suit is prosecuted that would have resulted from an active participation in the suit by the releasors, as near as may be."

3. It has been seen that four of the plaintiffs, in the present case, were *children* of the deceased, and that one of them, called "Baby Tomlinson," was a child seven months old; the other children, Alice, Fenton, and Howard, being respectively aged nine, seven, and five years (Rec., p. 71). Their respective damages were fixed by the *plaintiff* at $3,000 each, the jury having

allowed them each $8,000, while the *father and mother* of the deceased were cut off each with *one dollar*, the jury having allowed them each $5,000 as damages.

It is clear that Mrs. Tomlinson had no color of legal right to remit any portion of the amounts awarded in the action to the children and parents of the deceased, and that the transaction in regard to the verdict after it was rendered was unauthorized by law.

The trial Court had no power, under the statute, to allow or give effect to the remission, as assumed to be made by her, and render a judgment against the defendant for the sum remaining, and as divided by the remittitur presented among the beneficiaries in the action.

4. The verdict being, at least, grossly excessive, the defendant had a *right* to a new trial before the tribunal, and the only tribunal, authorized by the statute, to assess and apportion the damages, which could not be defeated by the action of the plaintiff, or by any order of the trial Court upon the motion for a new trial.

There was no warrant in the statute for the Court to put itself in the place of a jury, and say, as against the verdict rendered in the case by the jury, what sums were reasonable and proper amounts to be allowed the several beneficiaries as the pecuniary damages sustained by them, respectively, through the death complained of in the action.

This was the proper function and prerogative of a jury, under the procedure prescribed for the protection of the rights of all the parties to the action by the Statute of Arizona.

The remittitur, and the entered judgment upon it, were in plain violation of the rights of the defendant alike under the Constitution of the United States and the law of Arizona.

TENTH.

The Court below should have reversed the judgment upon the ground that the remission was not made in pursuance of an order of the trial Court upon the hearing of the motion for a new trial, directing that a new trial be had unless the plaintiff elected to remit a certain part of the verdict, and that if she did so remit, judgment be entered for the rest, or in pursuance of any equivalent order of the trial Court.

1. The Court below endeavored in its opinion to answer this objection to the validity of the proceeding, in this case, in respect to the remittitur, by the following observations:

"While the record does not affirmatively show that the trial Court made a remission of a portion of the damages awarded a condition precedent to his overruling the motion for a new trial, the damages awarded being clearly excessive, we think it *quite evident* that had the remittitur not been filed the Court would have granted the motion.

"A trial Court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the Court."

There is nothing in the record of the action of the trial Court on the motion for a new trial, which shows that "had the remittitur not been filed, the Court would have granted the motion."

This may be morally probable, or, as the Court below said, "quite evident," but the exigencies of the rule in regard to such a proceeding, are not satisfied by any moral probability that had the remittitur not been filed by the plaintiff, the Court would have ordered a new trial.

This Court, speaking by Mr. Justice Gray, in *Kennon* v. *Gilmer* (131 U. S., 29), said:

"The Court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may *order* that a new trial be had *unless* the plaintiff elects to remit a *certain part* of the verdict, and that, if he does so remit, judgment be entered for the rest."

The doctrine requires that the record of such a proceeding in any case shall show affirmatively that there was a judicial determination by the Court of the rights of the parties in respect to the damages upon the hearing of the motion for a new trial, and that the remission was entered in pursuance of an express order of the Court, ascertaining and deciding the amount for which judgment for the plaintiff may properly be rendered and entered, and putting the plaintiff to his election to renounce and remit the rest of the verdict in lieu of a new trial.

2. It is "quite evident" from this record that the remittitur, as it is called, was adjusted, in some way, out of court, by the attorneys of the plaintiff, who themselves, and not the Court, fixed the amount to be allowed to the respective beneficiaries, by purely arbi-

trary reductions of the sums fixed in the verdict; and that the judgment of the Court was in effect an absolute judgment upon the remittitur, without any decision and order made by it, in the matter of the damages, in the exercise of any judicial discretion with which the Court may have been invested, in the determination and disposition of the motion for a new trial.

The trial Court had no real participation in the proceeding by which the gross damages were fixed at $18,002, and the shares of the respective beneficiaries were fixed at the amounts stated in the so-called remittitur. The whole proceeding was, therefore, void.

ELEVENTH.

The Court below should have reversed the judgment of the trial Court upon the ground that the verdict was the result of or tainted by passion or prejudice; that no remittitur could cure the vice; and that it was the duty, therefore, of the trial Court to set the verdict aside, and submit the case to another jury.

1. Upon the views which the Court below entertained and expressed in regard to the motives and conduct of the jury in rendering this verdict, the jury were undoubtedly governed by passion or prejudice, and it was the duty of the Court to reverse the judgment of the trial Court.

The Court said:

"From a review of the whole case we can not say that the jury in finding for the plaintiff, in this action, *in a sum largely in excess of the damages proven*, delib-

erately disregarded the facts or the instructions of the Court.

"We rather incline to the view that the jury, having found the issues in favor of the plaintiff, was *then prompted through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted.*"

Upon such the views of the Supreme Court of the Territory, in regard to the motives and influences which induced the jury to render this verdict, "largely in excess of the damages proven," or "largely in excess of what the proofs warranted," the Court was bound to conclude and find that the jury were governed by passion or prejudice, in the meaning of the law, and should have reversed the judgment before it for that reason.

2. The theory of the Court below upon this subject seemed to be that unless the jury deliberately disregarded the facts or the instructions of the Court, their verdict should stand, although in finding it the jury were governed by passion or prejudice ; in other words, a verdict must not be rejected, unless it was the result *not only* of passion or prejudice, *but, also*, a willful disregard of the facts of the case or the instructions of the Court. (Rec., p. 122.)

If we understand this view of the subject, as stated by the Court below, it is not the law, or ought not to be the law.

Mr. Justice Clifford, in *Stafford* v. *Pawtucket Haircloth Co.* (2 Cliff., 82), after observing that the damages were greatly excessive, and without support in evidence, and that such errors may often be obviated by a re-

mission, said: "But where the circumstances clearly indicate that the jury were influenced by prejudice, *or* by a reckless disregard of the instructions of the Court, that remedy *can not* be *allowed.* Where such motives or influences appear to have operated, the verdict *must* be rejected, because the effect is to cast *suspicion* on the conduct of the jury and *their entire finding*."

3. But when the jury out of sympathy for the widow and children, and from that "enlarged liberality of which juries in such cases are usually possessed," found a verdict for an amount largely in excess of the "damages proven," it certainly "deliberately disregarded the facts of the case," and according to its own view, the Court below should have reversed the judgment rendered by the trial Court.

The effect of the influences under which the verdict was rendered, was "to cast suspicion upon the conduct of the jury and their entire finding."

The verdict unquestionably was so excessive as to strike everybody, at first blush, as beyond all measure unreasonable and outrageous, and such as manifestly showed that the jury were actuated by passion, partiality, or prejudice. It was not fit to be made the basis of any judgment in the case.

4. It is the general doctrine of the law of Texas, the State from which the laws and jurisprudence of Arizona seem to have been largely borrowed, that in the case of an excessive verdict, where the true amount of damages can not be correctly ascertained from the evi-

dence, a remittitur of part of the damages can not be allowed by a trial Court.

The Supreme Court of that State maintain the doctrine that an excessive verdict shows that the jury did not pay due regard to the evidence, but were actuated by passion or prejudice in coming to their conclusion, and that to allow a remittitur of a part of the damages, would be to substitute the finding of the Court for that of the jury. (Railway Co. *v.* Wilkes, 68 Texas, 621; Railway Co. *v.* Coon, 69 Tex., 735.)

Under the doctrine of the Supreme Court of Texas, it is unquestionable that no remittitur of any part of such a verdict as this could be allowed by any Court.

The Supreme Court of Illinois well said, that when a verdict is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion, or misconception, the remittitur does not remove the prejudice, passion, or misconception. "These elements may have entered, and probably did enter into the findings of other facts important to the issue, if not the issue itself." (Loewenthal *v.* Streng, 90 Ill., 76.)

But if it were even doubtful whether the verdict was the result of passion or prejudice, it is still clear that the jury intended to inflict *exemplary damages* to a greater or less extent upon the defendant, and no such damages were lawful under the law of Arizona; and that it was impossible in such a commingling of damages, included in the verdict, for the trial Court to separate them, and estimate the amount of any actual damages in the case, and allow a remittitur of the rest.

TWELFTH.

The Court below should have reversed the judgment of the trial Court, on the remittitur, upon the ground that as the complaint did not state facts sufficient to constitute a cause of action against the defendant under the Revised Statutes of Arizona, the trial Court had no power to allow the remittitur, and render a judgment against the defendant for the amount for which the verdict was allowed by the remittitur to stand.

1. It has been shown that as the complaint stated *no cause of action against the defendant for the death of the deceased, under paragraph 2145 of the Revised Statutes of Arizona*, no judgment could be rendered by the trial Court on the verdict, and the Court should have set aside the verdict.

It is clear, therefore, that the trial Court had no power to allow the remittitur filed by the plaintiff, and to render a judgmeut against the defendant for $18,002, the amount for which the verdict was allowed to stand by the so-called remittitur.

A trial Court has and can have no power to allow a remittitur in a case in which the verdict is impeached or impeachable upon any ground other than that the damages are excessive.

It is only where a verdict for the plaintiff can not be impeached, *except on the ground that the damages are excessive*, that the Court has any power or right upon the hearing of a motion for a new trial to make an

order in respect to a remission of a portion of the damages assessed by the verdict. (Arkansas Cattle Co. *v.* Mann, 130 U. S., 69, 73; Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 41, 53.)

2. The Court below, therefore, should have reversed the judgment of the trial Court, as entered by it after the filing of the so-called remittitur, in this case, upon the ground that as upon the facts stated in the complaint there was no right of recovery against the defendant company, no judgment could be rendered against it in favor of the plaintiff in the action.

A judgment for $18,002 was as invalid as one for $50,000, upon the complaint in this action, under the Statute of Arizona.

THIRTEENTH.

The Court below should have reversed the judgment of the trial Court, upon the ground that as there was no evidence before the jury showing the pecuniary injury resulting from the death of the deceased to the parties for whose benefit the suit was brought, or any of them, it was not in the power of the Court, on the hearing of the motion for a new trial, to make any order in respect to a remission of a part of the gross damages assessed by the verdict, or of portions of the shares of such damages awarded by the verdict to the respective beneficiaries named in it.

1. As has been said, the damages given by the Revised Statutes of Arizona are "proportioned to the injury resulting from such death," and are measured by the pecuniary injury to the respective parties

entitled. As said by the Supreme Court of Texas, in *March* v. *Walker* (48 Texas, 375), "the measure of damages is not the same as when a party himself sues for injuries received, and recovers compensation for physical and mental suffering."

The pecuniary injury must be proved, as held by the Supreme Court of Texas, by "such facts and circumstances as will enable the jury to return a verdict, based upon the evidence, which would approximate reasonable certainty, and enable the Court to pass advisedly, in reviewing this evidence, on a motion for a new trial." (Houston and Texas Central Railway Co. *v.* Cowser, 48 Tex., 375.)

Without such evidence, said the Court in that case, the verdict of the jury can be little more than a "merely speculative one," and the Court can have "no standard by which to determine its correctness."

2. It has, also, been seen, in this case, that the plaintiff proved no such facts and circumstances, on the trial, as enabled the jury to measure and determine the pecuniary injury to the respective parties, named in the complaint, as entitled to share in any recovery, or enabled the trial Court to pass advisedly upon the damages of those parties on the hearing of a motion for a new trial.

There was no more evidence, in the case, to sustain a verdict for $18,002 than there was to sustain the verdict for $50,000.

The Court could not determine, therefore, in its own mind, from the evidence, whether a verdict for $18,002

would be liable to the objection that it was excessive, or whether the sums, making up that gross amount, proposed by the plaintiff to be awarded to the respective beneficiaries of the suit, represented the pecuniary damages sustained by them on account of the death of the deceased.

It would not have been in the power of the trial Court, therefore, upon the hearing of the motion for a new trial, to make any order in respect to a remission of a part of the gross damages assessed by the verdict, or of portions of the shares of such gross damages awarded by the verdict to the respective beneficiaries of the suit.

The remittitur being without basis or support in any evidence in the case in relation to the damages, was an unauthorized and unlawful proceeding.

FOURTEENTH.

The judgment of the Court below should be reversed.

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Of Counsel for the
Plaintiff in Error.